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In the Supreme Court of the United States

OCTOBER TERM, 1980

CITY OF SOUTH LAKE TAHOE, ROGER CAPRI, as Mayor of the City of South Lake Tahoe; JOHN WYNN, ROBERT KAUFMAN, WILLIAM MOYER and PATRICIA LOWE, as City Councilmembers of the City of South Lake Tahoe,

Petitioners,

vs.

CALIFORNIA TAHOE REGIONAL PLANNING AGENCY, and GORDON HOOPER, GERALD M. POZNANOVICH, JAN CHATTEN-BROWN and KENNETH L. WOODWARD, individually and as members of the Governing Body of the California Tahoe Regional Planning Agency,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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QUESTIONS PRESENTED FOR REVIEW

1. Do city officials have standing to sue for a declaration of their rights and obligations with respect to regulations which they believe violate the United States Constitution but which they are required by law to enforce?

2. Does a municipality have standing to sue for a declaration of its rights and obligations with respect to regulations which it believes violate the United States Constitution but which it is required by law to enforce?

LIST OF PARTIES

Petitioners are City of South Lake Tahoe (the "City"), a general law city duly organized and existing under the laws of the State of California, its Mayor, Roger Capri, and the members of its City Council, John Wynn, Robert Kaufman, William Moyer and Patricia Lowe (collectively, "Councilmembers").

Respondents are California Tahoe Regional Planning Agency ("CTRPA"), which is a separate legal entity and political subdivision of the State of California organized and existing under the laws of the State of California, and individual members of its Governing Body, Gordon Hooper, Gerald M. Poznanovich, Jan Chatten-Brown and Kenneth L. Woodward.

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Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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Petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on June 25, 1980. The Court of Appeals held that Petitioners lacked standing to maintain this action and affirmed a judgment of dismissal entered by the United States District Court for the Eastern District of California.

OPINIONS BELOW

The opinion of the Court of Appeals is unreported; a copy is attached as Appendix A. The opinion and order of the District Court, dismissing Petitioners' action on grounds different from those relied upon by the Court of Appeals, is unreported; a copy is attached as Appendix B.

JURISDICTION

The Court of Appeals' judgment was entered on June 25, 1980. This Petition is filed within 90 days of that date. This Court has jurisdiction to review the judgment in question by writ of certiorari under 28 U.S.C. § 1254(1).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The statutes involved are 28 U.S.C. §§ 1331 and 2201 and 42 U.S.C. § 1983. The constitutional provisions involved are Articles III and VI and the Fifth and Fourteenth Amendments to the Constitution of the United States. The relevant portions of these provisions are set out verbatim in Appendix C.

STATEMENT OF THE CASE

This is an action for injunctive and declaratory relief brought by the City and its Councilmembers against CTRPA and members of its Governing Body pursuant to 28 U.S.C. §§ 1331, 2201.

In 1968, the states of California and Nevada entered into the Tahoe Regional Planning Compact (the "Compact") which was approved by Congress. Act of Dec. 18, 1969, Pub. L. No. 91-148, 83 Stat. 360. In accordance with the Compact, the Tahoe Regional Planning Agency ("TRPA") was created as a separate legal entity. It exists as a political subdivision of both the State of California and the State of Nevada.

Between February, 1972 and August, 1975, TRPA enacted a number of regulations and ordinances establishing minimum standards for land use and transportation in the Lake Tahoe Region

(the "TRPA Regulations"). These regulations, as amended from time to time, are in effect at present, the City and its Councilmembers are required to enforce them, and the City has amended its ordinances to conform to them.

On August 29, 1975, the Governing Body of CTRPA voted to enact its own scheme of regulation governing land use and transportation in the portion of the Lake Tahoe Region which is located within the State of California, including all of the City of South Lake Tahoe (the "CTRPA Regulations").[1] The City and its Councilmembers are required by law to enforce the CTRPA Regulations. Cal. Gov't Code §§ 67072, 67102.

The CTRPA Regulations impose restrictions upon land use and transportation which are not contained in the TRPA Regulations. The City and its Councilmembers believe that they conflict with and frustrate material provisions of the TRPA Regulations and that they infringe upon the federal domain in violation of the Supremacy Clause of Article VI of the Constitution.[2] Additionally, Petitioners believe that the CTRPA Regulations constitute a taking of property for public use without payment of just compensation, that they deprive persons subject to them (including Petitioners' residents and constituents) of the equal protection of the laws, and

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1. CTRPA was created by the California Legislature in 1967, Cal. Gov't Code §§ 67000 to 67130. When the Compact was approved by the California Legislature in 1968, the language of the legislation creating CTRPA which provided for its dissolution upon ratification of the Compact was deleted. 1968 Cal. Stats. Ch. 988, § 6. Additionally, the California Legislature enacted legislation providing that CTRPA would be included in the Compact provision that "any political subdivision may adopt and enforce an equal or higher standard applicable to the same subject of regulation in its territory." Cal. Gov't Code § 66801, art. VI(a); § 67040.

2. California Senate Bill No. 82, 1980 Cal. Stats. Ch. ....., amends the Compact in several material respects, *e.g.*, it adopts existing CTRPA Regulations, effective July 1, 1980 (subject to TRPA amendment or repeal) and it suspends CTRPA funding. These amendments have also been adopted by the Nevada Legislature (Nevada Assembly Bill No. 1, Special Session, 1980 Nev. Stats. Ch. .....) but, to become effective, must also be ratified by the Congress of the United States.

that they unlawfully infringe upon the right to travel—all in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States.

Notwithstanding their belief in the illegality and unconstitutionality of the CTRPA Regulations, Petitioners are required by law to enforce them and their refusal to do so would subject them to the risk of civil litigation and criminal charges since a violation of the CTRPA Regulations is a misdemeanor. Cal. Gov't Code §§ 67102, 67105, 67106. On the other hand, enforcement of the CTRPA Regulations requires Petitioners to violate their oaths of office to uphold the United States Constitution and subjects them to personal liability for violation of the constitutional rights of those affected by the CTRPA Regulations.

Because of this dilemma, the City and its Councilmembers initiated the present action seeking a declaration of their rights and obligations and injunctive relief against the enforcement of the unconstitutional CTRPA Regulations. The District Court, on motion of CTRPA, dismissed the action, holding that it should abstain from resolving what it viewed as a dispute between two state agencies over the proper application of state law. (Appendix B.) The Court of Appeals did not reach the abstention issue, but instead affirmed the dismissal of the action on the ground that neither the City nor its Councilmembers had standing to sue. (Appendix A.)

REASONS FOR GRANTING THE WRIT

I. In Denying Standing To The Councilmembers, The Court of Appeals' Decision Conflicts With This Court's Decisions In Board of Education v. Allen, 392 U.S. 236 (1968) and Owen v. City of Independence, Missouri, ... U.S. ....., 100 S.Ct. 1398 (1980) and With Decisions of the Second, Sixth and Eighth Circuits.

In *Board of Education v. Allen,* 392 U.S. 236 (1968), this Court affirmed the standing of a local school board to bring suit against the State Commissioner of Education challenging the constitution-

ality of a state statute requiring school boards to lend textbooks to private and parochial schools as violative of the Establishment Clause. Since the Board of Education believed the state statute was unconstitutional, it faced the dilemma of either enforcing the statute and violating the oath to uphold the constitution, or refusing to enforce the statute and violating the State's directive to furnish the textbooks. This Court held that such a dilemma, by itself, was sufficient to confer standing:

> "Appellees do not challenge the standing of appellants to press their claim in this Court. Appellants have taken an oath to support the United States Constitution. Believing Section 701 to be unconstitutional, they are in the position of having to choose between violating their oath and taking a step—refusal to comply with Section 701—that would be likely to bring their expulsion from office and also a reduction in state funds for their school districts. There can be no doubt that appellants thus have a 'personal stake in the outcome' of this litigation. *Baker v. Carr,* 369 U.S. 186, 204 (1962)." 392 U.S. at 241 n.5.

That is this case.

Allen was followed by the Court of Appeals for the Second Circuit in *City of New York v. Richardson,* 473 F.2d 923, 933 (2d Cir.), *cert. denied,* 412 U.S. 950 (1973), an action by the Mayor and Commissioner of Social Services of the City of New York challenging certain provisions of the New York Social Services Law,[3] and in *Aguayo v. Richardson,* 473 F.2d 1090, 1100 (2d Cir. 1973) *cert. denied,* 414 U.S. 1146 (1974), an action by the Commissioner of the New York City Department of Social Services,

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3. In finding that the city officials had standing to sue, the Court of Appeals for the Second Circuit stated:

> "With respect to standing, those plaintiffs who sued in their official capacities may assert constitutional claims against the state under the rule announced in *Board of Education v. Allen.* . . . This is so because of the conflict each of these officials must face between the sworn duty to uphold the Constitution of the United States and his responsibility for administrating New York's alleged unconstitutional Social Services Laws." 473 F.2d at 933.

among others, seeking to enjoin certain experimental work programs on constitutional and statutory grounds.

Allen also was followed by the Court of Appeals for the Sixth Circuit in *Akron Board of Education v. State Board of Education,* 490 F.2d 1285, 1291 (6th Cir.), *cert. denied,* 417 U.S. 932 (1974) (finding that the municipal school board had standing to challenge an order of the state school board on the basis of the "authoritative statement on this score" in *Allen*); and by the Court of Appeals for the Eighth Circuit in *Regents of the Univ. of Minn. v. NCAA,* 560 F.2d 352, 363-364 (8th Cir.), *cert. dismissed,* 434 U.S. 978 (1977) (holding that officials responsible for enforcing regulations have standing to challenge their constitutionality).

The Court of Appeals below acknowledged that *Allen* applied four-square to the facts of this case:

> "Were *Allen* the last word from the Supreme Court on standing, we could simply adopt the rationale of the quoted footnote and determine that the Councilmembers in the case before us have standing on the basis that they believe that enforcing the CTRPA's ordinances would violate their oaths of office." (Appendix A, p. 9.)

But the Court of Appeals below refused to follow *Allen.* Thus, its decision stands alone among the Circuits in its refusal to apply *Allen* in circumstances where the enforcement of a regulation allegedly would constitute a violation of the Constitution of the United States and subject the plaintiffs to civil liability.[4] The Court

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4. *Allen* was discussed, but not applied, in *Finch v. Mississippi State Medical Ass'n. Inc.,* 585 F.2d 765, 773-774 (5th Cir. 1978) where the plaintiff, the Governor of the State of Mississippi, had no pecuniary interest in the outcome of the litigation in that he was not threatened with ouster from office or with civil liability since he elected to disregard the provisions of the law he believed were unconstitutional.

Similarly, in *Athanson v. Grasso,* 411 F.Supp. 1153, 1156-1161 (D. Conn. 1976), *Allen* was discussed, but not applied. However, in that challenge to the constitutionality of Connecticut's educational financing system, the formula in question did not require enforcement action by the Hartford City Council so that plaintiffs were not being forced to violate anyone's constitutional rights.

of Appeals did not believe that *Allen* represented the "last word from the Supreme Court." To the contrary, it concluded that *Allen* could no longer be regarded as "binding Supreme Court precedent" (Appendix A, p. 10) in view of the subsequent decisions of the Court in *Schlesinger v. Reservists to Stop the War*, 418 U.S. 208 (1974); *United States v. Richardson*, 418 U.S. 166 (1974); and *Warth v. Seldin*, 422 U.S. 490 (1975).[5] In particular, it considered the *Allen* rule to be inconsistent with the statements in *Schlesinger* and *Richardson* that standing cannot be based on the "generalized interests of all citizens in constitutional government" (Appendix A, p. 11), or with, "just abstract outrage at the enactment of an unconstitutional law." (*Id.*, p. 11). It concluded that the Councilmembers' interest in the litigation was "official" rather than "personal" (*Id.*, p. 13), that the threat of civil liability was too "attenuated and conjectural" (*Id.*, p. 16) and that, therefore, their claim to standing was deficient.

But, contrary to the view of the Court of Appeals, this case differs significantly from *Warth, Schlesinger* and *Richardson*. In each of those cases, the legal interests of the plaintiffs were too remote and generalized to satisfy the "cases or controversies" requirement of Article III of the Constitution. For example, in *Schlesinger*, the plaintiff class lacked standing as "citizens" to challenge the Department of Defense's policy of permitting Members of Congress to hold posts in the Armed Forces Reserve on the ground that this policy violated the Incompatibility Clause. The Court held that the Secretary's nonobservance of the Incompatibility Clause "would adversely affect only the generalized

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5. The Court of Appeals is not free to depart from binding Supreme Court precedent unless it has clear directions from this Court to do so. *Solerno v. American League of Prof. Baseball Clubs*, 429 F.2d 1003, 1005 (2d Cir.), *cert. denied*, 400 U.S. 1001 (1970) ("[W]e continue to believe that the Supreme Court has the exclusive privilege of overruling its own decisions."); *Kovacs v. United States*, 355 F.2d 349, 351 (9th Cir.), *cert. denied*, 384 U.S. 941 (1966) ("Until the Supreme Court chooses to depart from its pronouncements [Courts of Appeals] are obligated to follow [them].")

interest of all citizens in constitutional governance. . . ." 418 U.S. at 217. Similarly, in *Richardson,* the Court held that a taxpayer's generalized grievance regarding the CIA's failure to issue a public Statement of Accounts and Expenditures pursuant to Article I, § 9, Clause 7 of the Constitution did not clear the threshold of Article III. 418 U.S. at 178. And in *Warth,* the Court held that a group of plaintiffs consisting of not-for-profit corporations interested in housing problems, taxpayers and residents lacked a sufficiently direct, monetary interest in local zoning practices to meet the constitutional prerequisite to standing.

Unlike the plaintiffs in those actions, Petitioners here have a fundamental relationship with the parties whose constitutional rights are violated by the CTRPA Regulations. They are the elected representatives of the citizens of the City of South Lake Tahoe and their obligation to protect the rights of their constituents rests upon a legal duty, not a generalized "motivation", *Schlesinger v. Reservists to Stop the War, supra,* 418 U.S. at 225-226; or because of a mere "interest in a problem", *Sierra Club v. Morton,* 405 U.S. 727, 739 (1972); and their concern is not a kind shared by citizens generally. *Schlesinger v. Reservists to Stop the War, supra,* 418 U.S. at 216-217; *United States v. Richardson, supra,* 18 U.S. at 176-179.[6]

Moreover, the interference by CTRPA with the Councilmembers' ability to protect the rights and interests of their constituents constitutes "injury in fact." *See, Washington Utilities & Transp.*

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6. That the Councilmembers' interest in the outcome of the proceedings is significantly different from citizens generally was acknowledged by the Court of Appeals below: "It may be argued that a public official charged with the enforcement of an allegedly unconstitutional state law does have a greater and more specific stake in the law's validity than the ordinary citizen. For example, the Councilmembers here must vote whether to enforce the CTRPA ordinances. While the ordinary citizen may remain passive and silent until he or she is actually victimized by an unconstitutional law, officials charged with a law's enforcement must, on pain of criminal liability, actively execute the law's commands." Appendix A, p. 11.

Comm'n v. F.C.C., 513 F.2d 1141, 1148-1151 (9th Cir. 1975).[7] The standing of a litigant who is forced to violate the constitutional rights of others has been recognized by this Court. For example, in *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958), the NAACP had been held in contempt for refusing to comply with an order requiring it to disclose its membership lists. It was allowed to raise its members' constitutional right of association as a basis for contesting the validity of the order. Similarly, in *Barrows v. Jackson*, 346 U.S. 249 (1953), a party to a restrictive covenant in a deed which denied non-Caucasian vendees their constitutional rights was allowed to challenge its validity.

The Court expressly acknowledged the continued validity of this line of cases in *Warth v. Seldin:*

> "In several cases, this Court has allowed standing to litigate the rights of third parties when enforcement of the challenged restriction against the litigant would result indirectly in the violation of third parties' rights. *See, e.g., Doe v. Bolton*, 410 U.S. 179, 188, 93 S.Ct. 739, 745, 35 L.Ed.2d 205 (1973); *Griswold v. Connecticut*, 381 U.S. 479, 481, 85 S.Ct. 1678, 1680, 14 L.Ed.2d 510 (1965); *Barrows v. Jackson, supra.*" *Warth v. Seldin, supra*, 422 U.S. at 510.

Here, the Councilmembers have alleged that enforcement of the CTRPA Regulations adversely affects their existing relationship with the very persons whose rights are violated: the citizens of the City of South Lake Tahoe. Those citizens elected the Councilmembers, among others, to uphold the Constitution of the United States and the Councilmembers have a fiduciary duty to those citizens to do so. The existence of such a direct, continuing relationship distinguishes the cases relied upon by the Court of

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7. This Court itself has suggested that the impairment of an agency's discharge of its official duties would support standing. *See, e.g., Coleman v. Miller*, 307 U.S. 433, 441-442 (1939) (recognizing "the legitimate interest of public officials . . . to resist the endeavor to prevent the enforcement of statutes in relation to which they have official duties."); *United States ex rel. Chapman v. F.P.C.*, 345 U.S. 153 (1953).

Appeals and underscores the propriety of according standing to the Councilmembers to protect the constitutional rights of those affected by the CTRPA Regulations.

However, the interest of the Councilmembers in the controversy is not limited to a concern for the constitutional rights of the residents of the City of South Lake Tahoe. Their own individual economic interests are also directly involved. Public officials enjoy a qualified immunity from liability under 42 U.S.C. § 1983, provided they act in good faith with a reasonable belief in the constitutionality of their actions.[8] But, good faith immunity from liability for damages under Section 1983 is lost if the official, "knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of [others]. . . ." *Wood v. Strickland,* 420 U.S. 308, 323 (1975).

In this case, Petitioners could not demonstrate a good faith, reasonable belief in the constitutionality of the CTRPA Regulations. The opposite is the case. They believe the CTRPA Regulations are unconstitutional. If they enforce them notwithstanding that belief, they forfeit their qualified immunity in any subsequent Section 1983 suit brought against them. They will be liable for having been right. That is not only unreasonable and unjust, but it also frustrates two of the purposes for the qualified immunity: to encourage decisiveness of judgment in the exercise of the official's public duties, *Scheuer v. Rhodes,* 416 U.S. 232, 240 (1974), and to attract the most capable individuals to elected office, *Wood v. Strickland, supra,* 420 U.S. at 320.

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8. *Pierson v. Ray,* 386 U.S. 547, 557 (1967) ("[I]f the jury found that the officers reasonably believed in good faith that the arrest was constitutional, then a verdict for the officers would follow even though the arrest was in fact unconstitutional."); *Scheuer v. Rhodes,* 416 U.S. 232, 248 (1974) ("It is the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good faith belief, that affords a basis for qualified immunity of executive officers for acts performed in the course of official conduct."); *Wood v. Strickland,* 420 U.S. 308, 323 (1975) ("The official himself must be acting sincerely and with a belief that he is doing right . . .").

There is another persuasive reason for recognizing standing in the circumstances of this case. In *Owen v. City of Independence,* ..... U.S. ....., 100 S.Ct. 1398 (1980), this Court denied a qualified immunity to municipalities in suits brought under the Civil Rights Act. It did so because it believed that the denial of immunity would further the objective of Section 1983 of deterring future constitutional deprivations. 100 S.Ct. at 1416. The Court observed that the imposition of liability without regard to the good faith of the municipality's public officials would create "an incentive for officials who may harbor doubts about the lawfulness of their intended actions to err on the side of protecting citizens' constitutional rights." *Ibid.* It also recognized that consideration of a municipality's prospective liability is a proper concern of public officials and that, "a decisionmaker would be derelict in his duties, if, at some point, he did not consider whether his decisions comport with constitutional mandates. . . ." 100 S.Ct. at 1418.

Here, the Councilmembers have been attentive to the constitutional rights of the individuals affected by their actions. They have sought a declaration of their rights and obligations with respect to regulations they are bound to enforce, but which they believe are unconstitutional. The opinion of the Court of Appeals denies them standing to obtain that declaration and thus undercuts the efforts of the Councilmembers "to comport [their actions] with constitutional mandates." The decision below thus undermines important objectives of Section 1983. This Court should review it for that reason alone.

II. In Denying Standing To The City, The Court of Appeals' Decision Misconstrues Williams v. Mayor of Baltimore, 289 U.S. 36 (1933) and Frustrates Efforts of Municipalities to Protect the Constitutional Rights of Their Constituents.

The Court of Appeals' decision, denying standing to the City, is not based on an application of the normal criteria governing

standing to sue in federal court. To the contrary, it results from a blanket rule that deprives a municipality of standing to challenge on constitutional grounds regulations it is required to enforce. The Court of Appeals believed its decision to disregard normal standing principles was mandated by *Williams v. Mayor of Baltimore,* 289 U.S. 36 (1933) and its progeny.

Williams involved a challenge by the Mayor and City Council of Baltimore of a Maryland statute exempting property of a particular railroad from taxation. The Court of Appeals for the Fourth Circuit had declared the statute invalid under the equal protection clause of the Fourteenth Amendment. This Court reversed, stating: "A municipal corporation, created by a state for the better ordering of government, has no privileges or immunities under the Federal Constitution which it may invoke in opposition to the will of its creator." 289 U.S. at 40.[9]

However, *Williams* presents no bar to the City's claims here.[10] Whatever the limitations may be on the power of a municipality to sue the state creating it, *cf. Rogers v. Brockette,* 558 F.2d 1057

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9. This decision follows a line of cases holding that municipal corporations are mere creations of the state and may exercise only those powers conferred upon them which the state may expand or withdraw at will. *See, e.g., City of Trenton v. New Jersey,* 262 U.S. 182, 187 (1923) ("A municipality is merely a department of the State, and the State may withhold, grant or withdraw powers and privileges as it sees fit. However great or small its sphere of action, it remains the creature of the State exercising and holding powers and privileges subject to the sovereign will.") *See also, Hunter v. City of Pittsburgh,* 207 U.S. 161, 179 (1907) ("[In its dealings with municipalities of its creation] the State is Supreme, and its Legislative Body, conforming its action to the state constitution, may do as it will, unrestrained by any provision of the Constitution of the United States.").

10. *Williams,* together with *Hunter v. Pittsburgh,* 207 U.S. 161, (1907) and *City of Trenton v. New Jersey,* 262 U.S. 182 (1923), have been construed by the Court of Appeals for the Fifth Circuit as descendants of *Trustees of Dartmouth College v. Woodward,* 17 U.S. 518 (1918). Viewed in this light, *Williams* merely reflects the proposition that the United States Constitution does not interfere in states' internal political organization; it is not, strictly speaking, a decision about a municipality's standing to sue. *See, Rogers v. Brockette,* 588 F.2d 1057, 1067-1071 (5th Cir.) *cert. denied,* 444 U.S. 827 (1979).

(5th Cir.), *cert. denied,* 444 U.S. 827 (1979) (distinguishing cases denying standing to a municipality), they have no application to these proceedings since the State is not a party to them.

The City does not contend that any powers of the State over it are restrained by the prohibitions of the Fifth or Fourteenth Amendments. The City does not attack the California statutes creating CTRPA, the State's delegation of authority to CTRPA to promulgate land use regulations, or any State law. Instead, its attack is limited to the CTRPA Regulations themselves, which the City contends are unlawful and unconstitutional. Since CTRPA is not the equivalent of the State itself, *see, e.g.,* Cal. Gov't Code §§ 940.4, 945, *Williams* is inapplicable.

If the general principles established by this Court to govern standing to sue in federal court are applied, it is clear that the City has standing. It has alleged "a distinct and palpable" injury to itself; it has asserted its own legal rights and interests; and it has presented a genuine, live case or controversy. *Warth v. Seldin,* 422 U.S. 490, 501 (1975).

For example, the City has alleged specifically (and CTRPA has never denied) that enforcement of the CTRPA Regulations will decrease property values and thereby decrease property tax revenues necessary to support public facilities and governmental operations. It also alleges that enforcement of the CTRPA Regulations will subject it to civil claims and litigation.[11]

Municipalities are "persons" within the meaning of the Civil Rights Act, 42 U.S.C. § 1983; *Morrell v. New York City Department of Social Services,* 436 U.S. 658, 700-701 (1978), and thus subject to suit for damages under its terms. As indicated above, in *Owen v. City of Independence, supra,* this Court held that municipalities did not enjoy a good faith immunity, and that their liability would depend solely on whether they had conformed

11. For purposes of ruling on a motion to dismiss for want of standing, "both the trial and reviewing courts must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party." *Warth v. Seldin,* 422 U.S. 490, 502 (1975).

their actions to the requirements of the Federal Constitution and Statutes. 100 S.Ct. at 1409. Accordingly, in seeking a judicial declaration of the correctness of its views, the City also seeks to protect its own rights, and not just the legal rights or interests of third parties. See *Warth v. Seldin, supra,* 422 U.S. at 499. In short, the sort of injury alleged by the City is sufficiently direct and immediate to show the requisite "personal stake in the outcome of the controversy." *Baker v. Carr,* 369 U.S. 186, 204 (1962). *See, Rogers v. Brockette, supra,* 588 F.2d at 1060-1061; and *City of Davis v. Coleman,* 521 F.2d 661, 670-672 (9th Cir. 1975).

Moreover, in *Owen,* the Court reasoned that to impose strict liability and to deny good faith immunity would serve as a deterrent against future constitutional deprivations:

> "The knowledge that a municipality will be liable for all of its injurious conduct, whether committed in good faith or not, should create an incentive for officials who may harbor doubts about the lawfulness of their intended actions to err on the side of protecting citizens' constitutional rights." 100 S.Ct. at 1416.

Indeed, in *Owen,* this Court observed that an official would be "derelict" in his duties, "if he did not consider whether his actions comport with constitutional standards." 100 S.Ct. at 1418.

The Court of Appeals' decision in this case has frustrated the City's attempt to do precisely what this Court said it should do. The City reviewed the CTRPA Regulations, concluded they infringe upon the constitutional rights of its residents and visitors to the City of South Lake Tahoe, and it filed suit for a declaration that the offending regulations need not be enforced. But the decision of the Court of Appeals below deprives the City of a judicial determination of the correctness of its views and risks the violation of constitutional rights. Thus, the decision conflicts with *Owen* and prevents the City from discharging one of its important obligations—the protection of its citizens' constitutional rights.

The close relationship between the City and the landowners whose constitutional rights are threatened by the CTRPA Regulations is an additional reason to recognize its stake in the controversy. In *Akron Board of Education v. State Board of Education,* 490 F.2d 1285 (6th Cir.), *cert. denied,* 417 U.S. 932 (1974) the Court of Appeals held,

> "We believe here that in terms of loss of territory and tax dollars and in terms of identity of interest with the asserted rights of the pupils and their parents, the Akron Board of Education and its Superintendent are true adversary parties and that their complaint states a 'case' or 'controversy' within the intendment of Article III of the U.S. Constitution." 490 F.2d at 1290.

See, also, Pierce v. Society of Sisters, 268 U.S. 570 (1925) (holding that a school could defend the constitutional rights of the pupils of the school and their parents).

In this case, the relationship between the City and its residents is at least as close as the relationship between the school board and the pupils of the school district in *Akron* and in *Pierce v. Society of Sisters.* In fact, the relationship is closer. The City and its elected officials are directly responsible for the promotion of the health, safety and welfare of all persons within the City's jurisdiction, yet they are compelled by law to enforce the CTRPA Regulations which they believe are violative of the constitutional rights of city residents and visitors.

Not only does the City have the same or closer relationship with the persons whose constitutional rights are violated as the plaintiffs in both *Akron* and *Pierce v. Society of Sisters,* but since it also alleges it will lose tax dollars as a result of the CTRPA Regulations and be subject to claims and litigation, it has the same or greater stake in the litigation. The Court of Appeals' decision conflicts with the holdings in *Akron* and *Pierce,* and it is contrary to the principles of standing that this Court has established.

III. The Court of Appeals' Decision Presents Important Questions Respecting the Rights and Obligations of Municipalities and Public Officials in the Discharge of their Duties.

Recently, this Court held that Section 1983 encompasses claims based on purely statutory violations of federal law, as well as civil rights and equal protection laws; and that under 42 U.S.C. § 1988, attorneys fees may be awarded to the prevailing party in all such actions, whether brought in state or federal court. *State of Maine v. Thiboutot,* ..... U.S. ....., 48 U.S.L.W. 4859 (June 25, 1980). As recognized by the dissenting Justices in that case, the holding "dramatically expand[s] the liability of state and local officials. . . ." *Id.,* at 4862. A sample of the federal cooperative regulatory and social welfare enactments which establish "rights" arguably protected under the Court's construction of Section 1983 is contained in the Appendix to the Dissent of Justice Powell in *Thiboutot* and is reproduced in Appendix D hereto.

Unquestionably, municipalities and local public officials face the prospect of litigation involving a wide variety of complex federal laws and regulations. Yet, the opinion of the Court of Appeals below denies them standing to seek a judicial determination of their rights and obligations under those laws—even when they believe that enforcement of local ordinances may conflict with federal laws or constitutional provisions.

The opinion of the Court of Appeals below is at odds with the objectives of the Civil Rights Act identified in *Owen v. City of Independence* as it unreasonably restricts the ability of public officials to avoid infringing upon important statutory and constitutional rights of persons affected by their actions. Additionally, it conflicts with the explicit ruling of this Court in *Board of Education v. Allen,* and with the decisions of Courts of Appeals of at least three other Circuits. The Court should grant certiorari to settle the important questions presented and to eliminate the conflicts in decisions.

CONCLUSION

A writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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September 19, 1980.

Appendix A

Court of Appeals' Opinion

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 77-3191

City of South Lake Tahoe, Roger Capri, as Mayor of the City of South Lake Tahoe, et al.,
Plaintiffs-Appellants,

vs.

California Tahoe Regional Planning Agency, and Gordon Hooper, et al.,
Defendants-Appellees.

[June 25, 1980]

OPINION

Appeal from the United States District Court for the Eastern District of California

Before: WALLACE and SNEED, Circuit Judges, and SOLOMON,* District Judge

WALLACE, Circuit Judge:

The City of South Lake Tahoe (City), and its mayor and members of its city council (collectively councilmembers) appeal from the district court's dismissal of their action against the California Tahoe Regional Planning Agency and four of its individual members (collectively CTRPA) for injunctive and declaratory relief. The district court ruled in response to two motions to dismiss brought by CTRPA, which separately raised both standing and

*Honorable Gus J. Solomon, United States District Judge, District of Oregon, sitting by designation.

abstention issues. In its order of dismissal, the district court relied on the rule that federal courts should, as a matter of discretion, abstain from exercising jurisdiction in cases where the federal constitutional claims that support jurisdiction would be mooted or altered by a state court interpretation of state law. The district court did not reach the question whether the City and councilmembers had standing, although this issue was fully briefed and argued. We do reach the standing question, because we find that standing must be ascertained before a court proceeds to exercise its discretion to abstain. Because we conclude that the City and councilmembers lacked standing, we affirm the dismissal of their action without reaching the abstention questions which would be posed only if jurisdiction were properly established.

I.

The CTRPA is a political subdivision of the State of California charged with creating and enforcing plans for land and resource development in the Lake Tahoe region. Cal. Gov't Code § 67040 *et seq.* (West Supp. 1979). The City and councilmembers allege that the land use regulations and regional and transportation plans adopted by the CTRPA are unconstitutional in several respects. Specifically, they allege that these plans and regulations so drastically limit residential development of unsubdivided property in the Tahoe basin, including the City, as to take property without just compensation and arbitrarily discriminate between similarly situated property owners in violation of the Fifth and Fourteenth Amendments of the Constitution. The City and councilmembers further allege violations of the right to travel guarantee inherent in the Constitution, and that the CTRPA's actions conflict with the plans and ordinances of a similar administrative body, the Tahoe Regional Planning Agency—a bi-state agency established by Com-

pact between California and Nevada and approved by Congress—in violation of the Supremacy Clause of the Constitution.

The City alleges that enforcement of the CTRPA regulations has a substantial and injurious effect on its municipal finances and claims standing on this basis. The councilmembers claim standing in that they are required by law to enforce the CTRPA's regulations, Cal. Gov't Code §§ 67072, 67102 (West Supp. 1979), and yet by voting to enforce these regulations would violate their oaths of office to uphold the U.S. Constitution and expose themselves to civil liability (pursuant to 42 U.S.C. § 1983) for enforcing an unconstitutional law. Violation of any of the CTRPA's ordinances is a misdemeanor, Cal. Gov't Code § 67106 (West Supp. 1979), as is a government official's willful failure to perform his duty, Cal. Gov't Code § 1222 (West 1966).[1] The councilmembers thus allege that failure to enforce the CTRPA's regulations could result in personal criminal liability, plus possible exposure to civil claims for non-enforcement (*e.g.*, mandamus actions authorized by Cal. Code Civ. Pro. § 1084 *et seq.* (West 1970)). They argue that their dilemma—they will be criminally and civilly liable for non-enforcement, and civilly liable for enforcement—generates standing.

II.

Standing is a necessary element of federal-court jurisdiction. *Warth v. Seldin,* 422 U.S. 490, 498 (1975). A threshold question in every federal case is, therefore, whether at least one plaintiff has standing. *Construction Indus. Ass'n of Sonoma County v. City of Petaluma,* 522 F.2d 897, 903 (9th Cir. 1975), *cert. denied,* 424 U.S. 934 (1976). Only after a court is satisfied that standing and the other jurisdictional prerequisites are met may it determine, within its discretion, whether to abstain. *See Miller-Davis Co. v.*

1. Neglect or violation of official duties may also result in a public official being removed from office. Cal. Penal Code § 661 (West 1970).

Illinois State Toll Highway Auth., 567 F.2d 323, 326 (7th Cir. 1977). Although the district court passed over the standing issue we must consider it because it governs our jurisdiction as well. *Jenkins v. McKeithen*, 395 U.S. 411, 421 (1969) (opinion of Marshall, J.). We therefore examine whether the City and councilmembers have standing to bring this case.

A. *The City's Standing*

It is well established that "[p]olitical subdivisions of a state may not challenge the validity of a state statute under the Fourteenth Amendment." *City of New York v. Richardson*, 473 F.2d 923, 929 (2d Cir.), *cert. denied*, 412 U.S. 950 (1973). *See Williams v. Mayor of Baltimore*, 289 U.S. 36, 40 (1933); *Newark v. New Jersey*, 262 U.S. 192, 196 (1923); *Trenton v. New Jersey*, 262 U.S. 182, 188 (1923); *Aguayo v. Richardson*, 473 F.2d 1090, 1100-01 (2d Cir. 1973), *cert. denied*, 414 U.S. 1146 (1974). This is true whether the defendant is the state itself or another of the state's political subdivisions. *See New Orleans v. New Orleans Water Works Co.*, 142 U.S. 79 (1891); *Akron Bd. of Educ. v. State Bd. of Educ.*, 490 F.2d 1285, 1297-98 (6th Cir.) (Weick, J., dissenting), *cert. denied*, 417 U.S. 932 (1974). Thus, the City may not challenge CTRPA's plans and ordinances on constitutional grounds.[2] Because all of its claims are based on the Constitution, the City's challenge was properly dismissed.

B. *The Councilmembers' Standing*

The essence of the standing question "is whether the litigant is entitled to have the court decide the merits of the dispute or of

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2. The City argues that two of our decisions, *City of Davis v. Coleman*, 521 F.2d 661 (9th Cir. 1975), and *Washington Util. & Transp. Comm'n v. FCC*, 513 F.2d 1142 (9th Cir. 1975), undermine the rule stated in, e.g., *Williams v. Mayor of Baltimore, supra*. But both cases are materially distinguishable from the facts in *Williams* and the case before us. The rule stated in *Williams* disables only *constitutional* challenges brought against *state* defendants. The challenges in both *Davis* and *Washington Utilities* were based on statutory grounds; further, in *Davis* there was at least one federal defendant.

particular issues. This inquiry involves both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise. . . . In both dimensions it is founded in concern about the proper—and properly limited—role of the courts in a democratic society." *Warth v. Seldin, supra,* 422 U.S. at 498 (citation omitted).

As a constitutional minimum, standing requires that a plaintiff allege

> "such a personal stake in the outcome of a controversy" as to to warrant *his* invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on his behalf. *Baker v. Carr,* 369 U.S. 186, 204 (1962). The Art. III judicial power exists only to redress or otherwise to protect against injury to the complaining party, even though the court's judgment may benefit others collaterally. A federal court's jurisdiction therefore can be invoked only when the plaintiff himself has suffered "some threatened or actual injury resulting from the putatively illegal action . . .." *Linda R.S. v. Richard D.,* 410 U.S. 614, 617 (1973). See *Data Processing Service v. Camp,* 397 U.S. 150, 151-154 (1970).

Id. at 498-99 (footnotes omitted) (emphasis in original). This consitutional minimum is sometimes described as the requirement that a plaintiff must allege "injury in fact." *Schlesinger v. Reservists to Stop the War,* 418 U.S. 208, 218 (1974); *Association of Data Processing Service Organizations, Inc. v. Camp,* 397 U.S. 150, 152 (1970).

Beyond this "minimum constitutional mandate," *Warth v. Seldin, supra,* 422 U.S. at 499, the Supreme Court has developed, as a prudential matter of self-governance, certain "other limits on the class of persons who may invoke the courts' decisional and remedial powers." *Id.* Precisely which categories of plaintiffs are excluded on constitutional grounds, and which on prudential grounds, however, is not always easy to ascertain. For example, in *Schlesinger v.*

Reservists to Stop the War, supra, the Court held that a plaintiff class lacked standing, as "citizens," to challenge the Department of Defense's policy of permitting Members of Congress to hold posts in the Armed Forces Reserve on the ground that this policy violated the Incompatibility Clause.[3] The Court said that the Secretary's nonobservance of the Incompatibility Clause "would adversely affect only the generalized interest of all citizens in constitutional governance, and that is an abstract injury." 418 U.S. at 217. In addition, the Court explicitly stated that such an "abstract injury" does not satisfy the Article III "cases or controversies" requirement. *Id.* at 227. Similarly, in *United States v. Richardson, supra,* 418 U.S. 166, 173-78 (1974), the Court said that a taxpayer's generalized grievance regarding the CIA's allegedly unconstitutional failure to issue a public Statement of Accounts and Expenditures pursuant to Art. I, § 9, cl. 7 of the Constitution[4] did not "clear the threshold [Article III] hurdle of *Baker v. Carr,* 369 U.S. [186,] 204 [(1962)]." 418 U.S. at 178.

Warth v. Seldin, supra, was decided the following term. There the Court, citing *Schlesinger* and *Richardson,* included in its list of prudential limitations the rule that standing should be denied when the only "asserted harm is a 'generalized grievance' shared in substantially equal measure by all or a large class of citizens." 422 U.S. at 499. *Accord, Duke Power Co. v. Carolina Environ-*

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3. Article I, § 6, cl. 2 of the U.S. Constitution states:
No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been encreased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.

4. Art. 1, § A, cl. 7 of the Constitution provides:
No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.

mental Study Group, 438 U.S. 59, 80 (1978).[5] Since the Court in *Schlesinger* and *Richardson* had explicitly grounded its holdings on Article III, the statements in *Warth* and *Duke Power* that plaintiffs who allege "abstract injuries" are barred as a prudential matter are perplexing. We thus admit to some confusion as to whether the "abstract injury" standing bar is constitutional, or instead prudential.[6]

One further complication adds to the complexity of our review. Until 1968 it was well established that state officials lack a sufficient personal interest in vindicating the Federal Constitution to grant them standing to challenge state statutes on consti-

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5. The Court has made it clear, in *Richardson, Schlesinger,* and *Warth,* that generalized grievances are insufficient to confer *standing* to sue. A second cases or controversy requirement, which is different from but often associated with standing, is that a case be *justiciable.* While standing "focuses on the party seeking to get his complaint before a federal court," justiciability involves "the issues he wishes to have adjudicated." *Simon v. Eastern Kentucky Welfare Rights Organization,* 426 U.S. 26, 38 (1976), *quoting Flast v. Cohen,* 392 U.S. 83, 99 (1968). The question whether the councilmembers have brought us a case or controversy is a matter of standing rather than justiciability. The deficiency in the instant action lies not in the nature of the issues: the issue whether the CTRPA ordinances violate the constitution is of a traditionally justiciable sort. The problem, as we discuss *infra,* is that the councilmembers' interest in these justiciable issues is too abstract; thus, they are the wrong litigants.

6. A third standing limitation, the so-called "nexus" requirement announced in *Flast v. Cohen,* 392 U.S. 83 (1968), is also a subject of some controversy in the Article III/prudential category debate. *See Duke Power Co. v. Carolina Environmental Study Group,* 438 U.S. 59, 79 n.25 (1978); *United States v. Richardson,* 418 U.S. 166, 181 (1974) (Powell, J., concurring). In *Flast,* the Court stated that to demonstrate standing a plaintiff must allege a "nexus between the status asserted by the litigant and the claim he presents." *Id.* at 102. The "nexus" requirement has not been completely interred, *see Schlesinger v. Reservists to Stop the War,* 418 U.S. 208, 227-28 (1974); *United States v. Richardson,* 418 U.S. 166, 171-74, but it has been confined to taxpayers' suits challenging congressional exercise of the taxing and spending power. *Duke Power Co. v. Carolina Environmental Study Group, supra,* 438 U.S. at 79; *Schlesinger v. Reservists to Stop the War, supra,* 418 U.S. at 225 n.15. It is thus clearly inapplicable to the instant case.

tutional grounds. *Columbus & Greenville Ry. v. Miller,* 283 U.S. 96, 99-100 (1931); *Braxton County v. West Virginia,* 208 U.S. 192, 197-98 (1908); *Smith v. Indiana,* 191 U.S. 138, 148-49 (1903); P. Bator, P. Mishkin, D. Shapiro, & H. Wechsler, Hart and Wechsler's, the Federal Courts and the Federal System 182 (2d ed. 173). For example, in *Smith v. Indiana, supra,* a county auditor sued the state of Indiana in state court, alleging that a state property tax statute violated the Fourteenth Amendment. The Supreme Court stated on appeal from the Indiana Supreme Court's judgment:

> [T]he jurisdiction of this court . . . can only be invoked by a party having a personal interest in the litigation. It follows that he cannot sue out a writ of error in behalf of third parties. . . . It is evident that the auditor had no personal interest in the litigation. He had certain duties as a public officer to perform. The performance of those duties was of no personal benefit to him. Their non-performance was equally so. He neither gained nor lost anything by invoking the advice of the Supreme Court as to the proper action he should take. He was testing the constitutionality of the law purely in the interest of third persons, viz., the taxpayers . . . . We think the interest of an appellant in this court should be a personal and not an official interest . . . .

191 U.S. at 148-49 (citations omitted).

In 1968, however, the Supreme Court, without mention of the *Smith v. Indiana, Braxton,* or *Columbus & Greenville* cases, held in a brief footnote that members of a school board had standing to challenge a state statute which they believed to violate the Federal Constitution. *Board of Educ. v. Allen,* 392 U.S. 236, 241 n.5 (1967). *Allen* was an appeal from a state-court judgment upholding the constitutionality of a statute which required school districts to provide textbooks without charge to school children in both public and private schools. The Court stated:

> Appellees do not challenge the standing of appellants to press their claim in this Court. Appellants have taken an oath to support the United States Constitution. Believing [the challenged statute] to be unconstitutional, they are in the position of having to choose between violating their oath and taking a step—refusal to comply with [the statute]—that would be likely to bring their expulsion from office and also a reduction in state funds for their school districts. There can be no doubt that appellants thus have a "personal stake in the outcome" of this litigation. *Baker v. Carr,* 369 U.S. 186, 204 (1962).

Id. The quoted footnote comprised the extent of the Court's discussion of the standing issue.

Were *Allen* the last word from the Supreme Court on standing, we could simply adopt the rationale of the quoted footnote and determine that the councilmembers in the case before us have standing on the basis that they believe that enforcing the CTRPA's ordinances would violate their oaths of office. Indeed, this is the approach taken by several of our sister circuits. *See Regents of the Univ. of Minn. v. NCAA,* 560 F.2d 352, 363-64 (8th Cir.), *cert. dismissed,* 434 U.S. 978 (1977); *Aguayo v. Richardson, supra,* 473 F.2d at 1100; *City of New York v. Richardson, supra,* 473 F.2d at 933. *Contra, Finch v. Mississippi State Medical Ass'n,* 585 F.2d 765, 773-75 (5th Cir. 1978); *Athanson v. Grasso,* 411 F. Supp. 1153, 1156-61 (D. Conn. 1976) (three-judge court). *See also Akron Bd. of Educ. v. State Bd. of Educ., supra,* 490 F.2d at 1289-91 (granting a school board standing to challenge state districting and transfer policies which increased segregation within school board's district on any of three theories: (1) *jus tertii* representation of parents and students; (2) the board's interest in preventing loss of territory and tax dollars; (3) the board members' desires not to violate their oaths of office and to avoid exposure to civil liability.). But *Allen* was followed by

Schlesinger, Richardson, Warth, and other cases which significantly tightened standing requirements. *See, e.g., O'Shea v. Littleton,* 414 U.S. 488 (1974); *Sierra Club v. Morton,* 405 U.S. 727 (1972). Neither the Second nor the Sixth Circuit has had the opportunity to reconsider the impact of *Allen* since *Schlesinger* and *Richardson.* The sum of recent Supreme Court teachings indicates that the *Allen* theory of standing, which was itself an abrupt departure from settled precedent, must be carefully considered. We thus proceed to determine what *Allen* now stands for and to analyze the councilmembers' standing to bring this case.

1. *The* Allen *Theory of Standing (by not enforcing CTRPA regulations).*

Since virtually every public official is subject to severe, and generally criminal, sanctions for non-performance of official duties, and also takes an oath of office which requires him or her to uphold the Constitution, the theory announced in *Allen* would confer standing on any public official who believes that a statute which he or she is charged with enforcing is unconstitutional. Although the councilmembers here urge that they may be exposed to civil liability should they choose to enforce the CTRPA ordinances, *Allen* does not demand anything more than a forced choice between violation of the oath of office and potential expulsion from office. We begin our analysis by considering whether *Allen* can properly be considered as binding Supreme Court precedent. We conclude it cannot and therefore that the councilmembers' desire not to violate their oaths of office does not confer standing. We then discuss whether standing is supplied

by the councilmembers' allegations[7] regarding potential exposure to civil liability.

The councilmembers do not seek here to represent the City's interests; if they did their claims would be barred along with the City's. Rather, the councilmembers assert that their personal dilemmas generate standing. The fundamental premise of *Schlesinger* and *Richardson,* however, is that a litigant's standing cannot be based on the "generalized interest of all citizens in constitutional governance." *Schlesinger v. Reservists to Stop the War, supra,* 418 U.S. at 217.

It may be argued that a public official charged with the enforcement of an allegedly unconstitutional state law does have a greater and more specific stake in the law's validity than an ordinary citizen. For example, the councilmembers here must vote whether to enforce the CTRPA ordinances. While the ordinary citizen may remain passive and silent until he or she is actually victimized by an unconstitutional law, officials charged with a law's enforcement must, on pain of criminal liability, actively execute the law's commands. It is also true that the class of public officials who might sue on an *Allen* theory is, relatively speaking, smaller than the class of all citizens. Thus, although each broadening of the courts focus brings charges of usurpation of power by the judiciary and "government by injunction," 418 U.S. at 222, standing for these public officials threatens our legitimacy less than would general citizen standing.

But the source of the public official's complaint, like that of the ordinary citizens in *Schlesinger* and *Richardson,* is just abstract outrage at the enactment of an unconstitutional law. Apart from

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7. The facts which demonstrate a plaintiff's standing must be alleged in the complaint. *See Jenkins v. McKeithen,* 395 U.S. 411, 422 (1969) (opinion of Marshall, J.). In considering these allegations "[f]or purposes of ruling on a motion to dismiss for want of standing, both the trial and reviewing courts must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party." *Warth v. Seldin, supra,* 422 U.S. at 501.

the highly speculative potential exposure to civil liability which we discuss *infra,* the councilmembers will lose nothing by enforcing the CTRPA's ordinances save an abstract measure of constitutional princple. No consequences, save those of conscience self-imposed by the councilmembers' personal beliefs, flow from the violation of the oath in performance of a statutory duty. *Compare Craig v. Boren,* 429 U.S. 190, 194 (1976) (vendor who was obliged by challenged statute to heed statutory discrimination against selling beer to males under 21 had standing because of her direct economic injury through the constriction of her buyers' market); *Barrows v. Jackson,* 346 U.S. 249, 255-56 (1953) (vendor would suffer "direct, pocketbook injury").

Thus, the councilmembers have available a course of action which subjects them to no concrete adverse consequences—they can enforce the CTRPA ordinances. That an alternative course exists—not enforcing the statute—which might result in criminal liability does not transform the councilmembers' abstract disagreement with the legislature over land use into judicially cognizable concrete injury. The criminal liability might support standing to challenge the relevant criminal statutes, perhaps on the theory that public officials should not be required to act contrary to their constitutional beliefs. But the councilmembers have not shown any concrete personal injury—criminal liability or otherwise—that results from the operation of the challenged CTRPA ordinances. The lesson of *Schlesinger* and *Richardson* is that constitutional principle divorced from concrete injury may suffice to generate a spirited legislative or public debate, but will not support a federal case.

This is not to denigrate constitutional principle, nor to urge upon public officials the violation of their consciences. But the difficulty with abstract constitutional grievances is that they lack the specificity and adversarial coloration that transmute vague

notions of constitutional principle into "'a form historically viewed as capable of judicial resolution.'" *Schlesinger v. Reservists to Stop the War, supra,* 418 U.S. at 218 (quoting *Flast v. Cohen,* 392 U.S. 83, 101 (1968)). *See also id.* at 220-22. We do not have official ombudsmen in this country, although we do have specially elected or appointed attorneys general. To confer standing on public officials because they wish not to enforce a statute due to private constitutional predilections, or because their decision not to enforce the statute may result in criminal liability, would convert all officials charged with executing statutes into potential litigants, or attorneys general, as to laws within their charge. *Schlesinger* and *Richardson* bar the courthouse door until the victim of a law's unconstitutional enforcement—in this case most clearly the landowners—chooses to knock. We hold, therefore, that the councilmembers' interest here is "official" rather than "personal," and therefore under the traditional rule of *Smith v. Indiana, supra,* 191 U.S. 138, and the more recent prohibitions expressed in *Schlesinger* and *Richardson* of standing to assert abstract injuries, the councilmembers' claim to standing is deficient.

2. *Councilmembers' Exposure to Civil Liability (by enforcing CTRPA regulations).*

Nor does the councilmembers' alleged exposure to civil liability provide a sufficiently concrete injury. In *Warth v. Seldin, supra,* the Court stated that "the standing question . . . bears close affinity to questions of ripeness—whether the harm asserted has matured sufficiently to warrant judicial intervention. . . ." 422 U.S. at 499 n.10.

> It must be alleged that the plantiff "has sustained or is immediately in danger of sustaining some direct injury" as the result of the challenged statute or official conduct. *Massachusetts v. Mellon,* 262 U.S. 447, 488 (1923). The injury

> or threat of injury must be both "real and immediate," not "conjectural" or "hypothetical." *Golden v. Zwickler,* 394 U.S. 103, 109-110 (1969); *Maryland Casualty Co. v. Pacific Coal & Oil Co.,* 312 U.S. 270, 273 (1941); *United Public Workers v. Mitchell,* 330 U.S. 75, 89-91 (1947).

O'Shea v. Littleton, supra, 414 U.S. at 494.

The exposure to civil liability which the councilmembers contend would be caused by their enforcement of the CTRPA ordinances is wholly speculative. In *O'Shea,* the plantiff class claimed that a judge and county magistrate were systematically violating black citizens' civil rights by discriminatory sentencing, setting of bond, and requiring payment for jury trials. The Court declined to grant an injunction against such activities, emphasizing that only "*if* [the plantiffs] proceed to violate an unchallenged law and *if* they are charged, held to answer, and tried in any proceedings before [the judge and magistrate]," 414 U.S. at 497 (emphasis in original), would the plaintiffs' injury materialize. The multiple contingencies precluded standing.

Similar multiple contingencies are present here. No lawsuit is currently threatened. The facts of this case are unlike *Steffel v. Thompson,* 415 U.S. 452 (1974), in which the Court granted standing to seek declaratory relief to a plaintiff who was threatened on two occasions with criminal prosecution if he persisted in passing out handbills at a shopping center. In *Steffel* the plaintiff's companion at each of three previous efforts to pass out handbills at the shopping center had already been arrested and prosecuted. In the instant case there is no immediate threat of suit nor reason to believe suit is inevitable. Moreover, the exposure in *Steffel* was to a criminal statute; enforcement of the statute here would expose councilmembers only to potential civil liability.

Further, it is by no means clear that an official who personally believes a statute to be unconstitutional, but enforces it anyway, is civilly liable solely on the strength of his subjective concerns. Under California law, public officials who act under the apparent authority of an enactment that is unconstitutional are not civilly liable if they acted "in good faith, without malice." Cal. Gov't Code § 820.6 (West 1966). Similarly, a public official is not liable under 42 U.S.C. § 1983 for actions taken under the authority of unconstitutional statutes unless he " 'knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of [the plaintiff], or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury to [the plaintiff].' " *O'Connor v. Donaldson,* 422 U.S. 563, 577 (1975) (quoting *Wood v. Strickland,* 420 U.S. 308, 322 (1975)). *See also Scheuer v. Rhodes,* 416 U.S. 232, 247-48 (1974). Moreover, an official "has no duty to anticipate unforeseeable constitutional developments." *O'Connor v. Donaldson, supra,* 422 U.S. at 577; *see Wood v. Strickland, supra,* 420 U.S. at 322.

This case, in which no California or section 1983 claim is present, would be a particularly poor record upon which to decide the difficult question whether an official who believes a statute to be unconstitutional can, for immunity purposes, be deemed nonetheless to act in good faith. The ripeness doctrine, particularly as it affects the standing question, *see O'Shea v. Littleton, supra,* 414 U.S. at 494, is designed primarily to avoid such conjecture. It is sufficient to point out the numerous contingencies which might prevent the councilmembers from ever being actually threatened with civil liability. We decide, therefore, that the

threat of civil liability is too attenuated and conjectural to supply the councilmembers with a basis for standing.[8]

IV

Neither the City's nor the councilmembers' claims supply a sufficient basis for standing to bring this action. Whether the abstract, generalized nature of the councilmembers' claims is considered a constitutional, or instead a prudential disability, their claims do not support federal-court jurisdiction. The action should therefore have been dismissed for lack of standing.

AFFIRMED.

SNEED, Circuit Judge, (concurring):

I concur in Judge Wallace's opinion subject to two observations. It is clear to me that, as Judge Wallace's opinion holds, the city council members have not brought themselves within the strict letter of the *Allen* footnote 5. No palpable threat of expulsion is alleged and I would afford *Allen* no larger scope in the operation of the law of standing. Second, standing should not turn on whether a public official might lack immunity in a civil proceeding under 42 U.S.C. § 1983. If *Allen* is to be extended to instances in which one horn of the dilemma is civil liability as a result of performance of the required duty, the probability of such liability should be quite high. Avoidance of either horn of the dilemma is always possible by a resignation with honor.

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8. The City and the councilmembers also argue that they are closely identified with and entitled to represent the interests of landowners and other persons not parties to this action whose constitutional rights are violated by the CTRPA's regulations. Standing to raise constitutional rights of third parties is available only where the litigant's own injury is "concrete and particularized." *Duke Power Co. v. Carolina Environmental Study Group, supra,* 438 U.S. at 81. Because the councilmembers' personal grievance is "abstract," the councilmembers' own injury fails this test. The City is absolutely barred by the rule in *Williams v. Mayor of Baltimore, supra,* 289 U.S. 36. We therefore need not consider the litigants' third-party contentions.

Appendix B

District Court's Opinion and Order
In the United States District Court
For the Eastern District of California

No. S-75-694

City of South Lake Tahoe, Roger Capri, as Mayor of the City of South Lake Tahoe; John Wynn, Robert Kaufman, William Moyer and Patricia Lowe, as City Councilmen of the City of South Lake Tahoe,

Plaintiffs,

vs.

California Tahoe Regional Planning Agency, and Gordon Hooper, Gerald M. Poznanovich, Jan Chatten-Brown and Kenneth L. Woodward, individually and as members of the Governing Body of the California Tahoe Regional Planning Agency,

Defendants.

[July 29, 1977]

OPINION AND ORDER

The City of South Lake Tahoe is seeking declaratory and injunctive relief. The complaint asks to have critical provisions of the Regional Plan and Land Use Ordinance enacted by the California Tahoe Regional Planning Agency [hereinafter referred to as CTRPA] declared constitutionally infirm. The following claims are set forth in the amended complaint: (1) Provisions of the Regional Plan and the Land Use Ordinance enacted by CTRPA have "taken property for public use without just compensation and without due process of law, in violation of the Fifth and Fourteenth Amendments to the Constitution." (2) Provisions of the CTRPA plans "deprive persons subject thereto of equal protection of the laws in violation of the Fifth and Fourteenth Amendments to the Constitution." (3) The CTRPA plan

and ordinances "unreasonably infringe the right to travel in violation of the Fourteenth Amendment to the Constitution of the United States. (4) The CTRPA plan, the land use ordinance and the transportation plan "are in conflict with and frustrate the purpose of the Tahoe Regional Planning Compact which was approved by Congress, the Tahoe General Plan, the Tahoe Land Use Ordinance and the Tahoe Transportation Plan, and otherwise violate the Supremacy Clause in Article VI of the Constitution." (5) The fifth claim seeks to enjoin the enforcement of the CTRPA plan, land use plan and transportation plan.

BACKGROUND FACTS:

In 1968, California and Nevada entered a Compact, the Tahoe Regional Planning Compact, which was approved by Congress, Public Law 91-148; 83 Stat. 360 (1969). Pursuant to the Compact, the Tahoe Regional Planning Agency (TRPA) was created as a separate legal entity and subdivision of both California and Nevada.

Between April of 1972 and August of 1975, TRPA enacted plans and ordinances which set minimum standards for governing land use and transportation with respect to land located in the "Lake Tahoe Region." During 1975, the governing body of CTRPA[1] enacted a regional plan, a land use ordinance, and a

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1. CTRPA was created by the California Legislature in 1967. Cal.Gov. Code §§ 67000 to 67130. When the Tahoe Regional Planning Compact was approved by the California Legislature in 1968, the language of the legislation creating CTRPA which provided for CTRPA's dissolution upon ratification of the TRPA Compact was deleted. California Statutes 1968, Ch. 988, § 6. Additionally, the California Legislature enacted legislation providing that CTRPA would be included in the TRPA Compact provision that:

> "[A]ny political subdivision may adopt and enforce an equal or higher standard applicable to the same subject of regulation in its territory." (Article VI(a), Cal.Gov.Code § 66801; Cal.Gov.Code § 67040).

transportation plan, all of which affect the California portion of Lake Tahoe, including the City of South Lake Tahoe. The CTRPA Regional Plan, the CTRPA Land Use Ordinance, and the CTRPA Transportation Plan impose requirements and restrictions which differ from, and which are not contained in, the TRPA General Plan, Land Use Ordinances or Transportation Plan. The difficulty in this case is that the CTRPA plans and ordinances are generally more restrictive than the TRPA plans and ordinances.

The CTRPA Land Use Ordinance prohibits further subdivision of land in the South Lake Tahoe region and proscribes residential development after September 19, 1975, until 85% of all vacant parcels of record have been employed either for residential or for commercial use. The plaintiffs claim that this restriction will exist until at least 2002, if in fact it is not a perpetual restriction. Thus, it is claimed, the economic use of a substantial portion of property in South Lake Tahoe is lost without just compensation or the due process of law. To this end the plaintiffs assert that each of the defendants intended by the enactment of the CTRPA plans and ordinances to prohibit the economic and beneficial use of the property in the City of South Lake Tahoe and further intended to take such property for public use without paying just compensation for it.

The equal protection claim urged by the plaintiffs is based on a class distinction described as existing between "persons who filed a subdivision map or otherwise divided property on or before September 19, 1975, and those who did not". The CTRPA Land Use Ordinance limiting the development of residential

property to one single-family dwelling per parcel is claimed to lack a reasonable relation to the protection of Lake Tahoe or the region's resources or any other legitimate governmental or public purpose.

The allegations in support of the claim that the CTRPA plans and ordinances violate the constitutionally protected right to travel are general and do not indicate that any third party has claimed that fundamental constitutional right to have been violated.

The plaintiffs also claim that the CTRPA plans and ordinances conflict with the TRPA plans and ordinances. If the plaintiffs enforce the CTRPA plan as they are required by law to do, they assert that they will be required to violate their oaths to uphold the Constitution and suffer the threat of civil and criminal liability. The argument is made that enforcement of the CTRPA plans will cause a decrease in property values within the City of South Lake Tahoe with the concomitant decrease in tax revenues or an increase in taxes.

The issues in this action are raised in two separate motions made on behalf of the defendants. There is a motion requesting the Court to abstain from the exercise of jurisdiction. There is a second motion which seeks dismissal of the complaint because the plaintiffs lack standing.

MOTION FOR ABSTENTION:

There are at least four recognized reasons for invoking the judicial doctrine of abstention. They are: (1) to avoid decision of a federal constitutional question where the case may be disposed of on questions of state law; (2) to avoid needless conflict with the administration by a state of its own affairs; (3) to leave to the states the resolution of unsettled questions of state law; and (4) to ease the congestion of the federal court docket.

Wright, *Law of Federal Courts,* § 52, p. 218 (3rd Ed., West, 1976).

CTRPA contends that this Court should abstain from exercising jurisdiction because the regional plan and land use ordinances (1) implement crucial California state governmental interests, and (2) the plan and ordinances are based on state and local considerations which should be separated from the federal constitutional issues the City seeks to litigate.

In this case, the defendants contend that *Burford v. Sun Oil Co.,* 319 U.S. 315 (1943), type abstention is mandated by the facts but they also urge that the elements of the other abstention cases, including *Railroad Commission v. Pullman Co.,* 312 U.S. 496 (1941), exist.

The plaintiffs, on the other hand, argue that abstention is an extraordinary and narrow exception to the duty of a district court to try a controversy before it. It is limited in application to circumstances which do not exist in this case. Thus, according to the plaintiffs' theory, this Court should exercise its jurisdiction.

The TRPA Compact provides that TRPA rules or regulations establish a minimum standard for the Tahoe Basin but

> "... any political subdivision may adopt and enforce an *equal or higher standard* applicable to the same subject of regulation in its territory." Art. VI(a) [Govt. Code § 66801] (emphasis added).

In turn, the CTRPA legislation provides that CTRPA is intended by the Legislature to be "a 'political subdivision' as that term is used in Article VI of the Tahoe Regional Planning Compact." Gov't Code § 67040. The equal or higher standard referred to as used in the Compact means equal or higher in terms of protecting the environment.

TRPA was established as a powerful planning agency, with authority to establish *minimum* land use standards and to ensure

compliance with the ordinances and plans passed. However, CTRPA, acting as a political subdivision within the meaning of the Compact, arguably may enact stricter standards if they are enacted consistent with a rational and legitimate California governmental interest. The resolution of these particular questions, the determination of what interests of California underly the particular statutes, plans and ordinances examined here, is a decision which must be made by the California courts consistent with their interpretation of the design of the TRPA and CTRPA legislation. I find this case is a proper case to invoke the judicial doctrine of abstention.

DISCUSSION:

Abstention is a judge-made doctrine sounding in the principles of Federalism enunciated in the Constitution—principles which have since been fleshed out by the federal courts. The doctrine sanctions escape from immediate federal decision only those cases which fall within narrowly limited special circumstances. *Propper v. Clark,* 337 U.S. 472 (1949); *Zwickler v. Koota,* 389 U.S. 241 (1967). The request to invoke the doctrine must be balanced against a justification of the expense and delay to which the application of the doctrine inevitably gives rise. *England v. Medical Examiners,* 375 U.S. 411 (1964).

The case law emanating from the United States Supreme Court teaches that there are several distinct rationalizations for the doctrine of abstention. The landmark Supreme Court decision on abstention is the case of *Railroad Commission of Texas vs. Pullman Co.,* 312 U.S. 496 (1941). In that case, the railroad company sought to enjoin the enforcement of an order of the Texas Railroad Commission which required lines operating in the State of Texas to have present in Pullman cars a Pullman conductor. Because of the social conditions giving rise to statements

such as it is "... well known, porters on Pullmans are colored and conductors are white", *Railroad Commission vs. Pullman, supra* at 497, a serious question of discrimination existed in the Texas policy and the Pullman porters involved were allowed to intervene. Justice Frankfurter noted that the issue raised by the Pullman porters with respect to equal protection and due process of law, as enunciated in the Fourteenth Amendment, raised a substantial constitutional question touching

> "... a sensitive area of social policy upon which the federal courts ought not to enter unless no alternative to its adjudication is open." *Railroad Commission v. Pullman Co., supra* at 498.

The *Pullman* case involved a state statute subject to state court construction and offering a possible resolution of the conflict while concomitantly avoiding the constitutional issue. The Supreme Court found the state court interpretive alternative in the *Pullman* case tipped the balance of judicial discretion in favor of abstention principally because it avoided the necessity of reaching the federal constitutional question unnecessarily or prematurely.

Pullman-type abstention is unwarranted in cases where the relevant state law is settled, *Lindsay v. Normet,* 405 U.S. 56 (1972), neither is it required where the questioned state statute is facially unconstitutional. *Kusper v. Pontikes,* 414 U.S. 51 (1973). The two recognized proscriptions against invoking *Pullman* abstention do not exist in this case. The CTRPA plans and ordinances do not, on their faces, violate the United States Constitution. Furthermore, there exists a potential resolution of at least some of the issues raised by the amended complaint in this action if the state courts of California are given the opportunity to construe the legislation authorizing the creation of the California Tahoe Regional Planning Agency, as well as the CTRPA plans and ordinances.

The underlying principle articulated in the *Pullman* case is that in the federal system the relationship between the states and the federal government should be scrupulously observed in an effort to maintain the harmonious relation between state and federal authority and to avoid needless federal friction with state policies. Although the City of South Lake Tahoe in this case argues that there is nothing ambiguous about the CTRPA plans and ordinances and that the mere fact that the state law is unsettled does not juistify abstention, there is a significant question here about the scope and intent of the California statutes and regulations governing the California portion of the Lake Tahoe region. In particular, there appears to be a conflict between the authority of CTRPA to enact the restrictive ordinances and regulations, in compliance with its mandate to protect the environment, and the mandate of the TRPA agency to effect minimum standards for the bi-state area through the auspices of the regulations of the Tahoe Regional Planning Agency. As the Ninth Circuit Court of Appeals stated in the case of *People of State of California, ex rel. Younger vs. Tahoe Regional Planning Agency,* 516 F.2d 215 (9th Cir. 1975, cert. denied 423 U.S. 894:

> ". . . [T]he Compact and the TRPA are *sui generis* offspring of a marriage between sovereign partners each extremely reluctant to relinquish its sovereignty over a portion of its territory. The TRPA is a powerful planning agency with authority to establish minimum land use standards applicable throughout the Basin and to police the region to ensure compliance with the general plan and any ordinances passed. *However, its sovereign creators did not envision it as a super bi-state zoning board whose approval would be a prerequisite to all land use development, or as an omnipotent board which could enforce its will over the majority vote of one state's delegation.* [Footnotes omitted.]
>
> "The TRPA itself recognizes the image of its authority, and

> has even delegated some of the authority to its local government entities."
>
> *People of State of California, ex rel. Younger v. TRPA, supra* at 218-219 (emphasis added).

The direct issue of authority, the nature of the sovereign's compact, and the reluctance to relinquish sovereignty over its territory reflects a conflict which might be resolved by the effort of the individual state courts.

A second, but not exclusive, abstention doctrine which has developed is that a federal court should refrain from exercising its jurisdiction in order to avoid needless conflict with the administration by a state of its own affairs. The leading case wherein this doctrine was mentioned was the case of *Burford v. Sun Oil Co.*, 219 U.S. 315 (1943). In the *Burford* case, the Sun Oil Company had attacked the validity of an order of the Texas Railroad Commission granting Burford a permit to drill four wells on a small parcel of land in an East Texas oilfield. The order, which was contested, involved the general regulatory system devised for the conservation of oil and gas in Texas. In that case, the Court addressed the issue articulated by Justice Black, as:

> "Assuming that the federal district court had jurisdiction, should it, as a matter of sound equitable discretion, have declined to exercise that jurisdiction here?" *Burford v. Sun Oil Co., supra* at 318.

A divided Court held that the district court should have dismissed the complaint on the ground that the issues involved a specialized aspect of a complicated regulatory system of local law which should be left to the local administrative bodies and courts. The defendants in this case argue that *Burford*-type abstention is absolutely mandated by the complexity and the interrelationships of the regulations, ordinances and statutes involving the South Lake Tahoe region and that those matters are particularly

susceptible to determination by the state. In *Burford*-type abstention cases, where a federal court defers to the states, the action is generally dismissed rather than the federal court retaining jurisdiction pending a state determination of the issue. If the state court to which deference is shown prejudices any federal rights of the parties, ultimate review can be sought in the United States Supreme Court.

The defendants also argue that the case of *Alabama Public Service Commission vs. Southern Railways,* 341 U.S. 341 (1951), supports *Burford*-type abstention in this case. In *Southern Railways,* a three judge federal district court had enjoined enforcement of a state commission order requiring the Southern Railway to continue intrastate train service. The railway company alleged that the Public Service Commission order denied it due process of law in that it confiscated the plaintiff's property by requiring it to operate the train for certain services at a loss. The Court found that the problems raised by the discontinuance of train service depended predominantly upon the local factor of public need for a continuation of service as opposed to the extent of loss to the train company. *Alabama Public Service Commission vs. Southern Railway, supra* at 347.

Here, the purpose of both the legislation creating CTRPA and the regional planning ordinance enacted by CTRPA is to conserve natural resources at Lake Tahoe, California. The vital state interest in this sitaution is the resolution of apparently conflicting opinions in the Tahoe region as to the direction the State of California, the bi-state Compact TRPA organization, and the CTRPA subdivision should go in attempting to protect the environment and economy inherent in that area of California. Another essential state interest intimately involved with this question of state policy is the necessity for sounder planning in the area. As the California Court said in *Selby Realty Company vs. City of Santa Buenaventura,* 10 Cal.3rd 110, 120 (1973):

> "The deletorious consequences of haphazard community growth in this state and the need to prevent further random development are evident to even the most casual observer. The legislation has attempted to alleviate the problem by authorizing the adoption of long-range plans for orderly progress."

In the case of *Fralin and Waldron, Inc. v. City of Martinsville, Virginia,* 493 F.2d 481 (4th Cir. 1974), former Justice Clark found that abstention was appropriate. The *City of Martinsville* case involved an action for declaratory and injunctive relief against the city and its agencies for refusing to grant the plaintiff a special use permit. Even though a federal constitutional question was presented, the three judge panel found that abstention was appropriate because the state adjudication could well avoid the necessity of determining the federal constitutional question as well as avoiding the needless friction in federal-state relations over the administration of purely state affairs. Although the *Martinsville case, supra,* relied principally on the case of *Louisiana Light & Power Co. v. City of Thibodaux,* 360 U.S. 25 (1959), it is closely related to the questions raised by *Burford*-type abstention.[2]

In the case of *Rancho Palos Verdes Corp. v. City of Laguna Beach,* 390 F.Supp. 1004 (C.D. Cal. 1975), affirmed 547 F.2d 1092, Judge Kelleher found abstention to be appropriate in an action brought against members of the City Council and Planning Commission of the City of Laguna Beach for allegedly engaging in a conspiracy to deprive the owners of certain property of its use. The case was decided on the basis of *Pullman*-type abstention but the Court found that:

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2. The *Louisiana Power & Light Co. v. City of Thibodaux* case, *supra,* involved a question of the state's eminent domain proceedings. The Court noted in the *Thibodaux* case that the abstention doctrine can apply in eminent domain cases, a question similar to the ultimate issue in this case.

> " . . . Traditional notions of federal-state comity and the general reluctance to decide prematurely and unnecessarily federal questions make abstention at this time wholly appropriate."

Judge Kelleher found that the Ninth Circuit Court of Appeals had addressed the question of exceptional circumstances necessary for abstention in the case of *Canton vs. Spokane School District #81,* 498 F.2d 840 (9th Cir. 1974). The Judge noted:

> " . . . [L]and use planning is a very sensitive social and political issue in California with which the state legislature and judiciary are deeply concerned. The federal courts ought not to intervene in the law-making process in this area unless faced with no alternative." *Rancho Palos Verdes Corp. v. City of Laguna Beach, supra* at 1005.

The questions raised by the complaint in this action sound in land use and ecological problems. The federal court ought not to interfere with such problems when the local officials are able to resolve them through the local sovereign without doing injustice to any of the parties.

In the case of *Sea Ranch Assn. v. California Coastal Zone Conservation Commission,* 396 F.Supp. 533 (N.D. Cal. 1975), modified 537 F.2d 1058, a three judge court in California decided an action brought by individual property owners challenging the California Coastal Zone Conservation Act. In the case, the Court held that in view of the ambiguities in the Act, which had not been definitively interpreted by California courts, the challenge presented an appropriate case for abstention. In its findings, the Court stated that it found the *Pullman*-type abstention facts to be present:

> "The abstention doctrine rests upon policy considerations of comity and judicial economy. First, abstention is appropriate for the avoidance of unnecessary interference with

> state regulatory schemes on the premise that federal intervention in such schemes would lead to conflicts in the federal-state relationship . . . . Second, abstention is appropriate to avoid a federal court making tentative or premature decisions on issues of state law when a state court decision may substantially eliminate or minimize the federal constitutional issue." *Sea Ranch Assn. v. California Coastal Zone Conservation Commission,* 396 F.Supp., *supra* at 537.

Although the *Sea Ranch Assn.* case as well as the *Rancho Palos Verdes Corp.* case involved the Civil Rights Act, alleged to be involved in this case, but not involved if the facts of the complaint are struck against the usual elements of such a claim, the principles articulated in the cases which involve the policies of the California courts, maintain here.

SUPREMACY CLAIM:

The fourth claim of the amended complaint alleged that a violation of the Supremacy Clause of the United States Constitution exists here because of the conflict between the more restrictive provisions of the CTRPA plans and ordinances and the minimum standards set by the TRPA plans and ordinances. The plaintiffs argue that the resolution of this conflict must be in the federal forum.

The apparent conflict, if it exists, is one of form and not of substance. Article VI, Cl. 2, provides:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

By this clause the Supreme Court has determined that the federal government is entitled to remove impediments to its action within

the federal sphere and to assert an immunity from state regulatory acts in carrying out the federal constitutional function. *Public Utility Commission vs. United States,* 355 U.S. 534 (1958). Every conflicting state law and policy must yield except where the federal authority leaves room for concurrent state action. *Pennsylvania v. Nelson,* 350 U.S. 497 (1956).

Public Law 91-148, 83 Stat. 360 (1969), is an affirmative Act of the Congress only to the extent that Congress approved joint legislation submitted to it by the states of California and Nevada. Approval was pursuant to Article I, Section 10, Cl. 3, of the Constitution, which provides that "[n]o State shall, without the Consent of Congress, . . . enter into any Agreement or Compact with another State, ..." The execution of a valid interstate compact, though an act of sovereignty, places the subject matter under federal jurisdiction and makes it subject to federal enforcement.[3] *Petty v. Tennessee-Missouri Commission,* 359 U.S. 275 (1959). It does not, however, on this ground alone, give rise to the kind of conflict envisioned by Article VI, the Supremacy Clause. There is room for state policy and law where the matters at issue go to the heart of the concept of Federalism; policies involving predominant state concerns are left to the states themselves. Ultimately, the language of Article VI literally binds state judges to follow the Acts of Congress when a conflict between state and federal interests exists.

The conflict between the CTRPA Plan and the TRPA Plan, as it arises from the facts in this case, involves questions of state

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3. The execution of a valid interstate compact makes questions arising thereunder subject to federal enforcement. This notion is, however, quite distinct from a notion which would make interstate compacts subject to exclusive federal enforcement. Such a policy would be inconsistent with the constitutional principle of Federalism. The Ninth Circuit Court's finding that the TRPA interstate compact involved a statute of the United States within the meaning of 28 U.S.C. § 1331(a), *League to Save Lake Tahoe v. Tahoe Regional Planning Agency,* 507 F.2d 517, 522 (9th Cir. 1974), is not inconsistent with the ruling made in this case.

policy and law, regardless of the congressional stamp of approval. As such, the resolution of the conflict can better be left to the state of California and its courts. The policy behind the doctrine of abstention still predominates. A compact is a contract. Ordinarily, in the interpretation of a contract, the meaning the parties attribute to the words governs the obligations and signfiicance of the provisions in the agreement. Thus, since California and Nevada were free to draft the terms of the TRPA Compact, the language of the Compact should be limited to the legal significance that either state has placed on the language when there is an intrastate conflict in its meaning.[4]

CONCLUSION:

This Court should abstain from exercising jurisdiction. What is involved here is an extensive state regulatory scheme which is intimately involved with the social, political and economic policies of the State of California and regions within that state. Thus, abstention is appropriate to avoid the needless conflict with the administration by the State of California with its own affairs. *Burford v. Sun Oil, supra.*

However, even if argument against abstention is not eclipsed by the *Burford* abstention reasoning, abstention must be favored when the *Burford* reasoning is coupled with the *Pullman* philosophy. There is a potential conflict here between the authority vested in the CTRPA agency to exercise more restrictive regulations of the use of land within the South Lake Tahoe region and the authority of the Tahoe Regional Planning Agency to set the absolute standards for the region. California's participation in

4. The Court expresses no opinion, nor is the issue raised by the facts of this case, concerning the propriety of the exercise of federal jurisdiction where there is a conflict between the interpretation given the TRPA Compact by the courts of California and the interpretation given the Compact by the courts of Nevada.

the bi-state Compact is approved in the same legislation in which the state of California authorized the continuation of the CTRPA agency and empowered it as a political subdivision to act within the minimum guidelines established by the TRPA plan. This Court could resolve the state conflict or potential conflict of policy; however, such a decision might later be resolved contrary to this Court's decision by the courts of the State of California and thus a decision in this case would be premature and at best tentative. Resolution of the questions raised by the potential conflict of authority between TRPA and CTRPA might eliminate the necessity of reaching the constitutional decision and thus abstention is appropriate on the basis of the *Railroad Commission v. Pullman* case, *supra.*

The case law that has developed since the Supreme Court's opinion in *Pullman* has been along distinct lines. Even though each case may be factually distinguished, it is necessary to look beyond to the facts of the cases and consider the underlying policy upon which the principle of abstention is based. The doctrine of Federalism allows the states to exercise authority in those areas of state concern and reserves to the federal government those areas which are of national concern. Certainly an argument of national import along the lines of "the house that John built" can be made, but national consequences are not the overriding concern here. The fundamental questions raised by the facts of this case involve the policy and administration of the State of California. The plaintiffs have previously taken their causes to the state courts. Those actions are technically still in existence. The state forum is better equipped, in conjunction with the state legislature and the state executive departments' policies, to resolve the questions at hand.

Having decided to invoke the doctrine of abstention, it is unnecessary to address the questions raised by the motion to dismiss

for lack of standing. Standing is a constitutional requirement and as such involves the determination of a constitutional question. Abstention, on the other hand, involves a question of a court-made doctrine founded on the constitutional principle of Federalism. A determination on the basis of the court-made doctrine precludes the necessity of reaching the constitutional question, a course sanctioned on many occasions by the Supreme Court. Therefore,

IT IS ORDERED that the defendants' motion to dismiss this case by invoking the doctrine of abstention be, and the same hereby is, granted. The Clerk is directed to dismiss this case and to inform the parties of the entry of this Opinion and Order.

Done and dated this 26th day of July, 1977.

James F. Battin
United States District Judge

Appendix C

Statutes and Constitutional Provisions Involved.

28 U.S.C. § 1331(a) provides as follows:

(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws or treaties of the United States, except that no such sum or value shall be required in any such action brought against the United States, any agency thereof, or any officer or employee thereof in his official capacity.

28 U.S.C. § 2201 provides as follows:

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1954, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

42 U.S.C. § 1983 provides as follows:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable ex-

clusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Article III, Section 21, of the United States Constitution provides, in relevant part, as follows:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

Article VI of the United States Constitution provides, in relevant part, as follows:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Amendment V to the United States Constitution provides as follows:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment XIV to the United States Constitution provides, in relevant part, as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Appendix D-Samples of Statutes That Arguably Could Give Rise to Section 1983 Actions

Appendix D

Samples of Statutes That Arguably Could Give Rise To Section 1983 Actions.

A. Joint regulatory endeavors

1. Federal Insecticide, Fungicide, and Rodenticide Act, 86 Stat. 973 (1972), as amended, 7 U.S.C. §§ 136 et seq.; see, e.g., 7 U.S.C. §§ 136u, 136v.
2. Federal Noxious Weed Act of 1974, 88 Stat. 2148 (1975), 7 U. S. C. §§ 2801-2813; see 7 U. S. C. § 2808.
3. Historic Sites, Buildings, and Antiquities Act, 49 Stat. 666 (1935), as amended, 16 U. S. C. §§ 461-467; see 16 U. S. C. § 462(e).
4. Fish and Wildlife Coordination Act, 48 Stat. 401 (1934), as amended, 16 U. S. C. § 661-666c; see 16 U. S. C. §661.
5. Anadromous Fish Conservation Act, 79 Stat. 1125 (1965), as amended, 16 U. S. C. § 757a-757d; see 16 U. S. C. § 757a(a).
6. Wild Free-Roaming Horses and Burros Act, 85 Stat. 649 (1971), as amended, 16 U. S. C. §§ 1331-1340; see 16 U. S. C. § 1336.
7. Marine Mammal Protection Act of 1972, 86 Stat. 1027, as amended, 16 U. S. C. §§ 1361-1407; see 16 U. S. C. § 1379.
8. Wagner-Peyser National Employment System Act, 48 Stat. 113 (1933), 29 U. S. C. §§ 49 et seq.; see 29 U. S. C. § 49g (employment of farm laborers).
9. Surface Mining Control and Reclamation Act of 1977, 91 Stat. 447, 30 U. S. C. §§ 1201-1328; see 30 U. S. C. § 1253.
10. Interstate Commerce Act Amendments of 1935, 49 Stat. 548, as amended, 49 U. S. C. § 11502(a)(2) (enforcement of highway transporation law).

B. Resource Management

1. Laws involving the administration and management of national parks and scenic areas: e. g., Act of May 15, 1965, § 6, 79 Stat. 111, 16 U. S. C. § 281e (Nez Perce National Historical Park); Act of Sept. 21, 1959, § 3, 73 Stat. 591, 16 U. S. C. § 410u (Minute Man National Historical Park); Act of Oct. 20, 1972, § 4, 86 Stat. 1302, 16 U. S. C. § 460bb-3(b) (Muir Woods National Monument).
2. Laws involving the administration of forest lands: e. g., Act of March 1, 1911, § 2, 36 Stat. 961, 16 U. S. C. §§ 563; Act of Aug. 29, 1935, ch. 808, 49 Stat. 963, 16 U. S. C. §§ 567a-567b.
3. Laws involving the construction and management of water projects: e. g., Water Supply Act of 1958, § 301, 72 Stat. 319, 43 U. S. C. § 390b; Boulder Canyon Project Act, §§ 4, 8, 45 Stat. 1058, 1062 (1928), as amended, 43 U. S. C. §§ 617c, 617g; Rivers and Harbors Act of 1988, § 9, 30 Stat. 1151, 33 U. S. C. § 401.
4. National Trails System Act, 82 Stat. 919 (1968), as amended, 16 U. S. C. §§ 1241-1249; see 16 U. S. C. § 1246(h).
5. Outer Continental Shelf Lands Act Amendment of 1978, § 208, 92 Stat. 652, 43 U. S. C. § 1345 (oil leasing).

C. Grant programs

In addition to the familiar welfare, unemployment, and medical assistance programs established by the Social Security Act, these may include:

1. Food Stamp Act of 1964, 78 Stat. 703, as amended, 7 U. S. C. § 2011-2025; see e. g., 7 U. S. C. § 2020e-2020(g).
2. Small Business Investment Act of 1958, § 602(d)(1), 72 Stat. 698, as amended, 15 U. S. C. § 636(d).

3. Education Amendments of 1978, 92 Stat. 2153, as amended, 20 U. S. C. §§ 2701 et seq.; see, e. g., 20 U. S. C. §§ 2734-2902.
4. Federal-Aid Highway legislation, e. g., 21 U. S. C. §§ 128, 131.
5. Comprehensive Employment and Training Act Amendments of 1978, 92 Stat. 1909, 29 U. S. C. §§ 801 et seq.; see, e. g., 29 U. S. C. §§ 823, 824.
6. United States Housing Act of 1937, as added, 88 Stat. 653 (1974), as amended, 42 U. S. C. § 1437 et seq.; see, e. g., 42 U. S. C. §§ 1437d(c), 1437j.
7. National School Lunch Act, 60 Stat. 230 (1946), as amended, 42 U. S. C. §§ 1751 et seq.; see, e. g., 42 U. S. C. § 1758.
8. Public Works and Economic Development Act of 1965, 79 Stat. 552, as amended, 42 U. S. C. §§ 3121 et seq.; see, e. g., 42 U. S. C. §§ 3132, 3151a, 3243.
9. Justice System Improvement Act of 1979, 93 Stat. 1167, 42 U. S. C. §§ 3701-3797; see, e. g., 42 U. S. C. §§ 3742, 3744(c).
10. Juvenile Justice and Delinquency Prevention Act of 1974, 88 Stat. 1109, as amended, 42 U. S. C. §§ 5601 et seq.; see, e. g., 42 U. S. C. § 5633.
11. Energy Conservation and Production Act of 1976, 90 Stat. 1125, as amended, 42 U. S. C. §§ 6801 et seq.; see, e. g., 42 U. S. C. §§ 6805, 6836.
12. Developmentally Disabled Assistance and Bill of Rights Act, 89 Stat. 486 (1975), as amended, 42 U. S. C. §§ 6001 et seq.; see, e. g., §§ 6011, 6063.
13. Urban Mass Transportation Act of 1964, 78 Stat. 302, as amended, 49 U. S. C. §§ 1601 et seq.; see, e. g., §§ 1602, 1604 (g)-(m).

No. 80-458

Supreme Court, U. S.
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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

CITY OF SOUTH LAKE TAHOE, ROGER CAPRI, AS MAYOR OF THE CITY OF SOUTH LAKE TAHOE; JOHN WYNN, ROBERT KAUFMAN, WILLIAM MOYER AND PATRICIA LOWE, AS CITY COUNCILMEMBERS OF THE CITY OF SOUTH LAKE TAHOE,

Petitioners,

v.

CALIFORNIA TAHOE REGIONAL PLANNING AGENCY, AND GORDON HOOPER, GERALD M. POZNANOVICH, JAN CHATTEN-BROWN AND KENNETH L. WOODWARD, INDIVIDUALLY AND AS MEMBERS OF THE GOVERNING BODY OF THE CALIFORNIA TAHOE REGIONAL PLANNING AGENCY,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. WHERE THE UNDERLYING ISSUES INVOLVE THE APPLICATION OF A COMPLEX, SPECIALIZED SYSTEM OF LAND USE PLANNING, AND PARALLEL LITIGATION BETWEEN THE PARTIES IS PENDING IN STATE COURT, IS APPLICATION OF THE FEDERAL DOCTRINE OF ABSTENTION AND THE RELATED RULE REQUIRING AVOIDANCE OF DUPLICATIVE LITIGATION WARRANTED?

II. DO A CITY AND MEMBERS OF ITS CITY COUNCIL HAVE STANDING IN FEDERAL COURT TO CHALLENGE REGULATIONS IMPOSED UNDER ADMITTEDLY VALID STATE STATUTES DESIGNED TO PROTECT THE ENVIRONMENT AND AMENITIES OF THE LAKE TAHOE BASIN?

III. SHOULD THIS COURT GRANT DISCRETIONARY REVIEW OF A CASE WHEN CONGRESS IS CONSIDERING APPROVAL OF AN INTERSTATE COMPACT LIKELY TO MAKE THE CASE MOOT?

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Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

Respondents California Tahoe Regional Planning Agency, Gordon Hooper, Gerald M. Poznanovich, Jan

Chatten-Brown and Kenneth L. Woodward [1] (referred to collectively as "CTRPA") hereby submit their joint brief in opposition to the petition for writ of certiorari, which seeks review of the decision of the United States Ninth Circuit Court of Appeals in this case.

OPINIONS BELOW

The 1980 opinion of the United States Ninth Circuit Court of Appeals is reported at 625 F.2d 231. The unreported opinion of the United States District Court for the Eastern District of California is reproduced as appendix B to the petition for writ of certiorari.

JURISDICTION

Petitioners (hereinafter referred to collectively as "the City") seek to invoke this Court's jurisdiction under 28 United States Code section 1254(1). For the reasons set forth in part II of the argument, *infra,* this Court lacks jurisdiction to consider the questions raised in the petition.

STATEMENT OF THE CASE

A. CREATION AND NATURE OF RESPONDENT CTRPA.

Respondent CTRPA is a political subdivision of the State of California. It was created by the California Legislature as a regional land use planning agency to address the difficult land use and ecological problems

[1] Since the commencement of this litigation, respondents Hooper and Woodward have resigned their positions as members of the CTRPA governing body.

existing in the California portion of the Lake Tahoe basin. A brief summary of the origins and responsibilities of CTRPA is essential to a full understanding of the issues raised in this petition.

In 1967, the California Legislature passed a proposed interstate compact with the State of Nevada that would have created a strong bi-state Tahoe Regional Planning Agency ("TRPA") with broad powers to protect the environment of the entire Lake Tahoe basin. The same California legislation contained a provision for creation of a CTRPA at the state level which was to be active only until the TRPA began functioning.

Nevada, however, refused to accept the California proposal and enacted its own version of a compact, one greatly lessening the ability and will of the TRPA to provide effective environmental protection. Among other things, the Nevada version increased local government representation to a majority of each state's TRPA delegation, removed much of TRPA's potential jurisdiction, and excluded certain major public works projects from TRPA review.

In 1968, California accepted Nevada's weakening amendments, and the Tahoe Regional Planning Compact ("the Compact") was ratified by Congress soon thereafter. Act of Dec. 18, 1969, Pub. L. No. 91-148, 83 Stat. 360 (1969); see also *Lake Country Estates, Inc.* v. *Tahoe Regional Planning Agency,* 440 U.S. 391 (1979). (As discussed in detail *infra,* both California and Nevada enacted major revisions to the Compact earlier this year.) In the same legislation, however, California made

the CTRPA a permanent agency and secured language in the Compact resolving that the bi-state TRPA,

> ". . . shall establish a *minimum* standard applicable throughout the basin, and [that] any political subdivision may adopt and enforce an *equal or higher standard* applicable to the same subject of regulation in its territory." Compact art. VI(a); Tahoe Regional Planning Compact of 1969, Pub. L. No. 91-148, 83 Stat. 360 (1969). (Emphasis added.)

In this manner, the California Legislature made it clear that CTRPA would have the power to adopt environmental regulations stricter than those adopted by TRPA.[2]

Until 1973, CTRPA functioned largely as an adjunct of TRPA, but by that point it had become clear that TRPA would not provide the level of environmental stewardship desired by California. See *People of the State of California* ex rel. *Younger* v. *Tahoe Regional Planning Agency,* 516 F.2d 215, 218 (9th Cir. 1975) *cert. den.,* 423 U.S. 868; *Raley* v. *California Tahoe Regional Planning Agency,* 68 Cal.App.3d 965, 971–972, 137 Cal.Rptr. 699, 702–703 (1977). In 1974, CTRPA began separate meetings and commenced independent rulemaking proceedings. The agency adopted a general plan and land use ordinance to guide development on the California side of the Lake Tahoe basin in mid-1975.

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[2] For a general history of the legislation which led to the TRPA and the creation of regional land use planning efforts at Lake Tahoe, see Note, *Regional Government for Lake Tahoe,* 22 Hastings L.J. 705 (1971).

B. CTRPA'S RELATIONSHIP TO THE CITY OF SOUTH LAKE TAHOE.

CTRPA's enabling legislation is set forth in sections 67000 through 67130 of the California Government Code. The agency consists of a seven member governing body, three of whose members represent each of the three local governments in the area (including an appointee of the City Council of the City of South Lake Tahoe), three state representatives, and a seventh member appointed by the other six to serve as chairman. The legislation contemplates a cooperative relationship between CTRPA and affected local governments such as the City. For example, CTRPA is directed by law to seek the assistance of local government in formulating its regional land use plan, and to harmonize that plan with the needs and existing plans of the City to the maximum extent possible. Cal. Gov't Code, § 67071. (West Supp. 1980). In return, the City is required to enforce the provisions of the CTRPA regulatory program. Cal. Gov't. Code, §§ 67072, 67102 (West Supp. 1980).

C. COMMENCEMENT OF THE CURRENT LITIGATION.

On October 17, 1975, the City filed suit against CTRPA and selected members of its governing body in the United States District Court for the Eastern District of California. The complaint, as amended, seeks injunctive and declaratory relief to nullify both the general plan and implementing ordinances adopted by CTRPA. Specifically, the City asserts that the CTRPA regulatory pro-

gram has deprived unspecified persons of their rights to just compensation, due process and equal protection under the Fifth and Fourteenth Amendments to the United States Constitution; that the CTRPA regulations impair the public's constitutional right to travel; and that these same regulations are somehow in conflict with the Tahoe Regional Planning Compact and TRPA's own implementing regulations, thereby violating the Supremacy Clause of the United States Constitution.

D. DECISIONS BELOW.

In response to the complaint, respondents filed two motions in the district court: the first requested the court to abstain from exercising its jurisdiction, while the second sought dismissal of the complaint on the grounds that the City lacked the requisite standing to bring the litigation. On July 29, 1977, the district court issued its opinion and order invoking the doctrine of abstention to dismiss the case. The court expressly declined to address the issue of standing.

The City appealed the district court's order. On June 25, 1980, the Ninth Circuit Court of Appeals affirmed the decision of the lower court. In so doing, the Court of Appeals did not reach the abstention issue. Instead, the court found that neither the City nor its councilmembers had standing to sue.

The substantive issues contained in this litigation are the subject of several pending actions in the California courts. See discussion at section I(A), *infra.*

SUMMARY OF ARGUMENT

1. Both the doctrine of abstention and the related rule requiring avoidance of duplicative litigation should be invoked in this case. First, abstention is warranted under the *Pullman* doctrine because a determination of pertinent state law by the California courts might well moot or alter the underlying federal constitutional issues presented in this case. Litigation raising various state law issues concerning the scope of CTRPA's land use powers is currently pending between the parties to this action in the California courts. Abstention is also warranted under what has become known as the *Burford* doctrine of abstention. This action, involving a dispute between two political subdivisions of the State of California regarding their respective land use powers, involves a classic example of sensitive policy issues that should be left to the state courts for initial review. Similarly, principles relating to the avoidance of duplicative litigation warrant dismissal of this case.

2. The lower court correctly held that petitioners lack standing to bring this action. In principal part, they seek to pursue claims on behalf of private parties who have a demonstrated ability to secure their own representation. Furthermore, longstanding precedent bars the City from challenging the constitutionality of the land use measures at issue. The claims of individual City officials that they face potential liability due to their enforcement of CTRPA regulations is wholly speculative, and has been rejected by federal courts in the past.

3. Major revisions to the TRPA Compact, recently adopted by California and Nevada and likely to be rati-

fied by Congress in the immediate future, would profoundly affect the claims asserted by the City and render this litigation essentially moot.

REASONS WHY THE WRIT SHOULD BE DENIED

I

THE FEDERAL DOCTRINE OF ABSTENTION AND THE RELATED RULE REQUIRING AVOIDANCE OF DUPLICATIVE LITIGATION COMPEL THE CONCLUSION THAT THE WRIT OF CERTIORARI SHOULD BE DENIED.

The district court correctly held that it should abstain from exercising jurisdiction over this case, basing its decision on independent analyses of several distinct facets of the abstention doctrine. That conclusion is equally compelling here, and warrants the Court's dismissal of the instant petition.

In *Colorado River Water Cons. Dist.* v. *United States,* 424 U.S. 800 (1976), this Court summarized the criteria that are applicable under the different categories of abstention, as well as under the rules governing duplicative litigation. The Court reviewed the various applicable doctrines as follows:

1. Abstention is appropriate in "in cases presenting a federal constitutional issue which might be mooted or presented in a different posture by a state court determination of pertinent state law." *Id.* at 814. This is commonly referred to as the *Pullman* doctrine of abstention, after the Court's decision in *Railroad Comm'n* v. *Pullman Co.,* 312 U.S. 496 (1941).

2. Abstention also lies in cases where difficult questions of state law are presented, bearing on policy problems of substantial public import whose significance transcends the result in a specific case before the court. The state law question itself may be determinative of state policy, but it is sufficient if merely the exercise of federal review of a question in a specific case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern. This category of abstention cases is generally referred to as the *Burford* doctrine of abstention, after the decision in *Burford* v. *Sun Oil Co.,* 319 U.S. 315 (1943). Under this category, it does not matter whether the case also presents substantial federal questions. As long as unsettled stated law questions which bear in important state policy problems are involved, the federal court must abstain.

3. Finally, this Court has held that even in cases where the traditional doctrine of abstention does not apply, principles relating to the avoidance of duplicative litigation may nevertheless require dismissal of the federal action in favor of state court adjudication. *Colorado River Water Cons. Dist.* v. *United States, supra,* 424 U.S. at 817–820.

The instant case falls squarely into the above two categories requiring abstention, as well as within the doctrine requiring dismissal on grounds governing duplicative litigation.

A. Abstention Should Be Ordered Because the Adjudication of the State Law Issues Presented in This Case May Avoid or Modify the Federal Constitutional Questions Raised in This Case ("Pullman Abstention")

As indicated, *Pullman* abstention applies to cases where "a federal constitutional issue . . . might be mooted or presented in a different posture by a state court determination of pertinent state law." *County of Alleghany* v. *Frank Mashusa Co.,* 360 U.S. 185, 189 (1959); *Sederquist* v. *City of Tiburon,* 590 F.2d 278 (9th Cir. 1978).

This particular type of abstention has recently been applied consistently by the federal courts in cases involving municipal and regional land use problems. See, *e.g., Sederquist* v. *City of Tiburon, supra,* 590 F.2d 278 (abstention proper in action challenging application of municipal land use ordinance pending conclusion of related state court proceedings); *Rancho Palos Verdes Corp.* v. *City of Laguna Beach,* 547 F.2d 1092 (9th Cir. 1976) (same); *Hill* v. *City of El Paso,* 437 F.2d 352 (5th Cir. 1971) (federal courts should refrain from hearing challenge to city ordinance banning junkyards because state court proceedings more appropriate); *Beck* v. *State of California,* 479 F.Supp. 392 (C.D.Cal. 1979) (abstention invoked to avoid interference with extensive state efforts to implement regional land use controls of coastal development).

Pullman and its progeny establish a three-part standard for applying this type of abstention. First, does the complaint touch "a sensitive area of social policy upon which the federal courts ought not to enter unless no

alternative to its adjudication is open"? Second, can such constitutional adjudication plainly be avoided by a definitive ruling on the state issue that would terminate the controversy? Finally, is the possibly determinative issue of state law doubtful? *Railroad Comm'n* v. *Pullman Co.,* 312 U.S. 496, 498–500 (1941).

Each of these criteria is amply satisfied in the present case. There can be little doubt that land use planning is today a most sensitive area of social policy. *Penn Central Transp. Co.* v. *New York City,* 438 U.S. 104 (1978). Federal courts have in the past been most reluctant to intrude in this area unnecessarily. In *Rancho Palos Verdes Corp.* v. *City of Laguna Beach, supra,* 597 F.2d 1092, the Ninth Circuit clearly articulated the reasons for allowing land use regulations to be reviewed by the state courts in the first instance:

> "The complaint involves land use planning. An array of State constitutional provisions and statutes demonstrate that this is today a sensitive area of social policy . . . one upon which federal courts ought not to enter unless no alternative to its adjudication is open." *Id.* at 1094.

Moreover, federal adjudication of the validity of CTRPA's regulatory program can be avoided through resolution of issues of state law. These include the scope and intent of CTRPA's enabling legislation, the nature of jurisdiction conferred on the City under state law vis-a-vis CTRPA, and the efficacy of the CTRPA regulations under applicable provisions of the California Constitution. In an era of congested federal dockets, the instant case is an example of a controversy more appropriately decided by the state courts in the first instance.

Finally, the various, potentially-determinative issues of state law are as yet unresolved. California courts have not yet had the opportunity to consider the issues set forth above. Notably, however, cases are currently pending in California courts that have the clear potential of resolving these very issues. In *California Tahoe Regional Planning Agency* v. *City of South Lake Tahoe* (Alpine Co. Super. Ct. No. 584), litigation has been initiated between these same parties to establish the extent and nature of the City's obligations to enforce CTRPA regulations.[3] The Court is respectfully requested to take judicial notice of the pendency of these state court actions under rule 201 of the Federal Rules of Evidence.

Thus, all of the requirements found to justify abstention under the *Pullman* doctrine have been met in this case.

B. Abstention Should Be Ordered so as to Avoid Needless Interference With the State's Attempts to Implement and Develop State Policy in Regulating a Difficult and Complex Area of Vital State Concern ("Burford Abstention")

Where a court abstains under *Pullman,* retention of jurisdiction, and not dismissal of the action, is the proper

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[3] Suits are similarly underway between CTRPA and other local jurisdictions with legal relationships to CTRPA identical to those of the City. Besides raising each of the federal constitutional issues contained in the present case, one of these lawsuits present numerous arguments that CTRPA regulatory actions are invalid under the California Constitution and state administrative law. *CTRPA* v. *County of El Dorado* (Alpine Co. Super. Ct. No. 583); *CTRPA* v. *County of Placer* (Alpine Co. Super. Ct. No. 573). Counsel for the parties have stipulated that these actions and the related CTRPA/City litigation in Alpine County be consolidated for trial.

course. *Rancho Palos Verdes Corp.* v. *City of Laguna Beach, supra,* 547 F.2d at 1096. On the other hand, where abstention is appropriate under *Burford* v. *Sun Oil Co., supra,* 319 U.S. 315, the action must be dismissed. While the instant case is plainly one in which *Pullman* abstention is appropriate, respondents believe the case presents even stronger grounds for abstention under *Burford.* Accordingly, the Court is urged to adopt that course in this case.

Stated simply, the *Burford* abstention requires that the federal court abstain in order to avoid needless interference with the state's attempts to implement and develop state policy in regulating a difficult and complex area of vital state concern. *Colorado River Water Cons. Dist.* v. *United States, supra,* 424 U.S. at 814–816.

It is exceedingly difficult to envision a case in which application of the *Burford* doctrine would be more warranted than in the present case. This action involves a dispute between a California local government and a political subdivision of the State of California attempting to carry out a state regulatory program. Creation of CTRPA and its regulatory program was a direct legislative response to a perceived inability of local government to resolve vital public concerns about degradation of the Lake Tahoe environment. The California Legislature enunciated those concerns most forcefully in the

findings accompanying the legislation creating CTRPA.[4]

The intervention of the federal judiciary in this attempt by a California local government to overturn a vital state regulatory program would most grievously impair the concept of comity. It would frustrate the ability of a state, as a sovereign, to assign responsibility and allocate authority among its own agencies and political subdivisions.

In *Younger* v. *Harris,* 401 U.S. 37, 44 (1971), the Court described the concept of comity as:

> ". . . a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate State Governments and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways." See also *Alabama Public Service Comm'n* v. *Southern R. Co.,* 341 U.S. 341, 347 (1951).

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[4] Sections 67000–02 of the California Government Code provide that:

"It is found and declared that the waters of Lake Tahoe and other resources of the Lake Tahoe region are threatened with deterioration or degeneration, which may endanger the natural beauty and economic productivity of the region."

"It is further declared that by virtue of the special conditions and circumstances of the natural ecology, developmental pattern, population distribution and human needs in the Lake Tahoe region, the region is experiencing problems of resource use and deficiencies of environmental control."

"It is further found and declared that . . . for the purpose of enhancing the efficiency and governmental effectiveness of the region, it is imperative that there be established an areawide planning agency with power to adopt and enforce a regional plan of resource conservation and orderly development, to exercise effective environmental controls and to perform other essential functions, as enumerated in this title."

The Ninth Circuit Court of Appeals recently articulated its respect for the principles of comity as applied to land use issues:

> "California is attempting to grapple with difficult land use problems through new policies and new mechanisms of regulation. . . . *Federal courts must be wary of intervention that will stifle innovative State efforts to find solutions to complex State problems." Rancho Palos Verdes Corp.* v. *City of Laguna Beach, supra,* 547 F.2d at 1095. (Emphasis added.)

The CTRPA regulatory program challenged by the City represents just such an innovative effort to resolve protracted, complex land use problems in a region of inestimable value. Application of abstention under the *Burford* doctrine is required to ensure that this objective is not frustrated.

C. The Rule Regarding Avoidance of Duplicative Litigation Requires Dismissal of This Action in Favor of State Court Adjudication

Even in cases where the traditional doctrine of federal abstention may not apply, principles relating to the avoidance of duplicative litigation may nevertheless require dismissal of the federal action in favor of state court adjudication. These principles rest on "considerations of 'wise judicial administration given regard to conservation of' judicial resources and comprehensive disposition of litigation." *Colorado River Water Cons. Dist.* v. *United States, supra,* 424 U.S. at 817.

In *Colorado River Water Cons. Dist.,* the Court noted that in assessing the appropriateness of federal dismissal

due to the presence of a concurrent state proceeding, a carefully considered judgment taking into acount both the obligation to exercise jurisdiction and the combination of factors counselling against that exercise is required. No one factor is necessarily determinative. The Court listed the following as examples of appropriate factors to be considered:

1. The desirability of avoiding piecemeal litigation;
2. The inconvenience of the federal forum; and
3. The order in which jurisdiction was obtained by the concurrent forums.

As previously indicated, virtually all of the constitutional allegations contained in the City's complaint in this action are raised in the litigation between CTRPA and local government now pending in state court. Conversely, there have as yet been no proceedings in the present case going to the substantive issues raised in the City's complaint.

For these reasons, the rule regarding avoidance of duplicative litigation strongly suggests that dismissal of this action in favor of state court adjudication is warranted.

II

THE CITY AND MEMBERS OF ITS COUNCIL LACK STANDING TO ATTACK THE STATE REGULATIONS IMPOSED ON PROPERTY IN THE LAKE TAHOE BASIN

The United States Court of Appeals for the Ninth Circuit found that the City of South Lake Tahoe and several individual members of its city council lacked the stand-

ing necessary to establish federal court jurisdiction over this case. This determination was entirely correct and in keeping with long-established principles of standing as enunciated by this Court. Furthermore, a denial of the writ requested herein will not result in any substantial harm to petitioners or those whom they purport to represent.

In an important recent case dealing extensively with the standing issue, this Court, after noting that standing involves both constitutional and prudential considerations, observed:

> "In its constitutional dimension, standing imports justiciability: whether the plaintiff has made out a 'case or controversy' between himself and the defendant within the meaning of Art. III. This is the threshold question in every federal case, determining the power of the court to entertain the suit. As an aspect of justiciability, the standing question is whether the plaintiff has 'alleged such a personal stake in the outcome of the controversy' as to warrant *his* invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on his behalf." [Citation omitted.] *Warth* v. *Seldin,* 422 U.S. 490, 498–499 (1975). (Emphasis in original.)

In implementing this rule, two relevant tests have been laid down. First, the federal courts will not normally attempt to resolve "generalized grievances shared by large numbers of citizens." Second, even when the plaintiff has alleged some specific injury to himself, he must also assert the violation of his own rights, not the rights of third parties. *id.* at 499–500.

The instant case provides a nearly casebook example

of a situation where none of the factors normally relied upon to find standing are present.

The basic allegations of the petitioners are that respondents have enacted plans and ordinances which unconstitutionally restrict the use of privately owned land lying within the boundaries of the City of South Lake Tahoe. For example, the complaint alleges that the CTRPA regional plan and land use ordinance prohibit the subdivision of land until a certain percentage of the existing lots within a specified area have been utilized for the construction of at least one dwelling unit or structure. Amended Complaint for Declaratory and Injunctive Relief, p. 6. It is then alleged that this restriction has "taken" a "substantial amount of real property within the California portion of the Lake Tahoe Region, including property within the City of South Lake Tahoe . . . ." *Id.* It is also alleged, in the broadest possible terms, that the CTRPA land use ordinance and regional plan are "wholly arbitrary," and that they deprive "persons subject thereto" of due process of law, equal protection under the law, and the right to travel. *Id.* at 7. However, no injury whatsoever is alleged to any land belonging to the City or any of the named plaintiffs. The complaint asks instead that the federal courts invalidate numerous provisions of the CTRPA regional plan and land use ordinance *in toto* without any consideration of the impact on even one specific parcel of land. As the trial court noted, however, "The CTRPA plans and ordinances do not, on their faces, violate the United States Constitution." Petn. for Writ of Cert., p. 23.

A. Petitioners Are Not Entitled To Raise The Rights of Third Parties

As noted in *Warth* v. *Seldin, supra,* one is not normally entitled to assert constitutional rights and immunities belonging to others. See, e.g., *McGown* v. *Maryland,* 366 U.S. 420, 429–430 (1961); *Tileston* v. *Ullman,* 318 U.S. 44 (1943). Virtually all of the exceptions permitted have involved specially protected rights such as freedom from racial discrimination or freedom of speech, a party involuntarily before the court as a defendant, a party with an exceptionally close relationship to those whose rights are being asserted, or, perhaps most importantly, the impracticability of the assertion of the claimed rights by the third parties. *See, e.g., NAACP v. Alabama* ex rel. *Patterson,* 357 U.S. 449 (1958). See generally Sedler, *Standing to Assert Constitutional Jus Tertii in the Supreme Court,* 71 Yale L.J. 599 (1962). Usually some combination of these factors is present. Here, none of them point to a finding of standing. First, this case does not involve freedom of religion or speech. Secondly, the parties wishing to assert the rights of others are plaintiffs in this suit. Third, the plaintiffs herein, while "related" to some of the landowners whose rights they purport to assert in the sense that the plaintiffs represent them on the city council, do not have a relationship which has been used to find standing in other cases. See, e.g., *Reuss* v. *Balles,* 584 F.2d 461 (D.C. Cir. 1978). Moreover, many of those purportedly being represented are supporters of the CTRPA plans and ordinances, either because their land is increased in value by the regulations or for

more philosophical reasons. Thus, some of those who are being "represented" would no doubt decline such representation were they given the choice. Finally, if there is one absolute certainty about this case it is that the landowners who oppose CTRPA regulations are entirely capable of securing their own representation; indeed, a number have already done so and have pressed their cases with great vigor.[5] The attempt of the city to also represent these landowners can only result in confusion and possibly inconsistent results.

B. Petitioners' Alleged Injuries Are Wholly Speculative And Do Not Support Invocation Of Federal Court Jurisdiction

Even were the Court to find that the petitioners should have been allowed to base their claims on the rights of third parties, standing still would not exist unless the City or its council members could allege " 'such a personal stake in the outcome or the controversy' as to warrant [their] invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on [their] behalf." *Warth* v. *Seldin, supra,* 422 U.S. at 498.

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[5] See, e.g., *Dillingham Development Co.* v. *California Tahoe Regional Planning Agency, City of South Lake Tahoe, et al.* (E.D. Cal., No. S-77-285). *Dillingham Development Co.* v. *California Tahoe Regional Planning Agency* (Sacramento Co. Super. Ct. No. 272204) (alleging that CTRPA's temporary ban on new subdivisions has resulted in an unconstitutional taking of its property). (As to the disposition of the complaint against the City of South Lake Tahoe in the state court case, see discussion at section II (B), infra.) See also, *Brockway Development Co.* v. *California Tahoe Regional Planning Agency* (Placer Co. Super. Ct. No. 56841); *Perini* v. *California Tahoe Regional Planning Agency* (E.D. Cal., No. S-77-149); *Perini* v. *California Tahoe Regional Planning Agency* (San Francisco Super. Ct. No. 720-386).

Their interests are, in fact, wholly abstract, and much more ideological then practical.

Petitioners assert that the City and the council member-plaintiffs will be injured because the City's tax base may be decreased and that both the City and individual councilmembers will be injured by suits arising from their enforcement of the allegedly unconstitutional provisions of the CTRPA plans and ordinances. Neither of these theories serves for either the City or the councilmembers.

With regard to the City, as the Ninth Circuit recognized below:

> "It is well established that '[p]olitical subdivisions of a state may not challenge the validity of a state statute under the Fourteenth Amendment.' " [Citations omitted.] 625 F.2d at 233.

As this Court noted over 70 years ago, since the State creates municipal corporations as convenient agencies for exercising "such of the governmental powers of the State as may be entrusted to them," the state is entirely free to alter their powers in any manner, to take any of their property without paying any compensation whatsoever, and may even destroy the municipality totally without any restraint imposed by the U.S. Constitution:

> "In all these respects the State is supreme, and its legislative body, conforming its action to the state constitution, may do as it will, unrestrained by any provision of the Constitution of the United States. Although the inhabitants and property owners may by such changes suffer inconvenience, and their property may be lessened in value by the burden of

> the increased taxation, or for any other reason, they have no right by contract or otherwise in the unaltered or continued existence of the corporation or its powers, and there is nothing in the Federal Constitution which protects them from these injurious consequences. The power is in the State and those who legislate for the State are alone responsible for any unjust or oppressive exercise of it." *Hunter* v. *Pittsburgh,* 207 U.S. 161, 178–179 (1907).

The City attempts to distinguish this case and the numerous others to the same effect cited below by the Ninth Circuit on the ground that this is a suit against a political subdivision alleging that the ordinances of the political subdivision are invalid. (The City admits that the statutes authorizing the adoption of those ordinances are valid.) However, this argument is supported by no authority of which we are aware, and none is cited by the City. Petn. for Writ of Cert., p. 13; see *New Orleans* v. *New Orleans Water Works Co.,* 142 U.S. 79 (1891). The purported distinction in fact only points out the bizarre nature of this case: it is a suit filed by one political subdivision of the State of California against another political subdivision of the State of California alleging the invalidity of ordinances admittedly enacted under a valid delegation of authority by the state to the defendant political subdivision. A finding that standing exists here would certainly require a broader concept of federal jurisdiction and standing than has previously been thought proper by this Court.

Petitioners' assertion that they should be granted standing based on the potential liability of the individual

councilmembers for enforcing or failing to enforce the provisions of the CTRPA plans and ordinances is equally flawed. The argument they make is that state law requires them to enforce CTRPA plans and ordinances, yet if they do so they will be violating their oaths to support and defend the U.S. Constitution and will be subjected to civil and criminal liability for their actions.

Numerous cases decided by this Court have stated that a public official interested only in doing his official duty may not challenge the constitutionality of a statute. See e.g., *Ashwander* v. *Valley Authority,* 297 U.S. 288, 346–348 (1936); *Smith* v. *Indiana,* 191 U.S. 138, 149 (1903).

In the past few years, several federal courts have recognized a narrow class of cases in which local officials were allowed to maintain constitutional causes of action. See *Board of Education* v. *Allen,* 392 U.S. 236, 241, n. 5 (1968); *Akron Board of Ed.* v. *State Board of Ed. of Ohio,* 490 F.2d 1285, 1289–1291 (6th Cir. 1974), *cert. den.,* 417 U.S. 932 (1974); *Aguayo v. Richardson, supra,* 473 F.2d 1090, 1100–1101 (2nd Cir. 1973); *New York.* v. *Richardson, supra,* 473 F.2d 923, 933 (2nd Cir. 1973). All of these cases, however, involved education, religion, or welfare, and in all of them those whose interests were allegedly being violated would have had difficulty in protecting their own interests.

Warth v. *Seldin, supra,* indicates that the general rules pertaining to standing still apply and any exceptions are just that—exceptions.

By contrast, the parties whose real interests underly

this litigation could properly raise the constitutional causes improperly raised by plaintiffs. This Court may take judicial notice for purposes of this argument that these non-parties—taxpayers and property owners within the Lake Tahoe Basin—include among them large, well-financed land developers, speculators, and individual landowners. This Court should not allow public officials to speak for those who are perfectly able to speak for themselves.

Two recent cases have also rejected the notion that *Allen* and its progeny should be construed as overruling the long-standing doctrine that an official's desire to comply with an oath is not sufficient to establish standing in federal court to challenge the constitutionality of statutes. In *Baxley* v. *Rutland,* 409 F.Supp. 1249 (M.D. Ala. 1976) (3 judge court) the court held that the Attorney General of Alabama did not have standing either under a *parens patriae* theory or a "violation of oath" theory to challenge a statute enacted by the Alabama Legislature. The court noted:

> "We emphasize that this case is instituted solely upon the authority of the Attorney General. His mind alone is the directing force. In the unlikely event that he becomes convinced that the Alabama statutes under attack are not violative of the Constitution, or if he should be succeeded by another who so concludes, then certainly at that time this case would lack that 'concrete adverseness which sharpens the presentation of issues upon which the court so depends for illumination of difficult constitutional questions.' *Baker* v. *Carr, supra,* 369 U.S. at 204, 82 S.Ct. at 691, 7 L.Ed.2d at 678, quoted and followed in

Flast v. *Cohen, supra,* 392 U.S. at 99, 88 S.Ct. 1952, 20 L.Ed.2d at 961.

"The subjective opinion of the Attorney General without any other personal stake in the outcome is too weak a base to support the concept of standing and the jurisdictional requirement of a case or controversy between parties with adversary interests. . . ." 409 F.Supp. at 1257.

Similarly, in *Finch* v. *Mississippi State Medical Assn., Inc.,* 585 F.2d 765, 773–775 (5th Cir. 1978) the court rejected the Mississippi governor's claims to standing based on his claims that he was forced to choose between violating his oath and being sued for damages.

Petitioners' claim that they will be subjected to civil liability if they perform their ministerial duty to enforce the CTRPA plans and ordinances is at best speculative. Furthermore, it is simply not consistent with the actual cases which have tested the theory, none of which are mentioned by petitioners.

The plaintiffs in *Western Internat'l Hotels* v. *Tahoe Regional Planning Agency,* 387 F.Supp. 429 (D. Nev. 1975), contended that the actions of the bi-state TRPA had unconstitutionally deprived them of their property and named as defendants the counties in Nevada in which their property was located along with the TRPA. In considering motions to dismiss filed by all of the defendants the court said:

"Boise Cascade and Western Hotels argue that the Counties are liable for the effects of the [Land Use Ordinance] because the Counties have the duty of enforcing the [Land Use Ordinance] and the obligation of funding TRPA. It is also pointed out that the

> Counties appoint one representative to the governing body. The Counties, however, had no part in enacting the Tahoe Regional Planning Compact nor did they legislate the Land Use Ordinance. The duty to enforce and finance TRPA actions was thrust on the Counties by the Compact. While TRPA may be an agent of the States, it is clearly not an agent of the Counties. If a cause of action is made out against TRPA, it will not constitute a cause of action against the Counties. The requests of these plaintiffs for injunctive relief against the enforcement by the Counties of the [Land Use Ordinance] may be considered at such time as [the Land Use Ordinance] is invalidated and the Counties persist in enforcing it. . . ." 387 F.Supp. at 438.

Similarly, in *Jacobson* v. *Tahoe Regional Planning Agcy.,* 566 F.2d 1353 (9th Cir. 1978) rev'd on other grounds, aff'd on other grounds sub nom. *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency,* 440 U.S. 391 (1979), the Ninth Circuit was called upon to review the dismissal of a complaint against the TRPA and several counties requesting declaratory, injunctive, and monetary relief for a taking of property by TRPA's Land Use Ordinance. 566 F.2d at 1358. The court affirmed the dismissal:

> "The only possible cause of action against the counties would be one to enjoin their enforcement of the challenged ordinance. As to monetary and declaratory relief, the action against the counties was properly dismissed because the alleged infringement of constitutional rights arises from the action of TRPA. The Compact limits the involvement of the counties to a sharing of the enforcement power with the cit-

ies, the states and the TRPA. Their involvement is purely ministerial, and thus peripheral to the allegations underlying this suit.

"Moreover, there is no evidence that the counties would attempt to enforce the challenged ordinance were the court to declare it unconstitutional. It appears that the counties even look with favor on appellants' development plans.

"We conclude that it was not error to dismiss the suits as against the counties." 566 F.2d at 1361.

The statutory language requiring the City to enforce the CTRPA plans and ordinances is identical to that requiring county enforcement of TRPA plans and ordinances.[6] Indeed, virtually the only difference between the relationships is that the counties are required to financially support TRPA while the City has no such obligation with respect to CTRPA.[7]

The City and its officials are hardly unaware of these cases, as they were cited by the City in a *successful* demurrer to a complaint in a state court brought against both CTRPA and the City by Dillingham Development Company, and *amicus curiae* below in the instant case. (The City's demurrer, its points and authorities in support thereof, and the judgment of dismissal after the sustaining of the demurrer are reproduced in Appendix A, hereto.) The first ground of the City's demurrer was stated as follows:

"Each cause of action alleged fails to state a cause of

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[6] *Compare* Cal. Gov. Code, §§ 67072 and 67102 (West Supp. 1980) *with* Cal. Gov. Code, § 66801, art. VI(b) (West Supp. 1980).

[7] See Cal. Gov. Code, § 66801, art. VIII(a).

> action against defendants City of South Lake Tahoe in that City is not responsible for the actions of CTRPA, nor for the creation of their plans and ordinances, nor for the consequences of those plans and ordinances." Appen. A, p. 2.

We are aware of no actions by private parties in which the City or any of its officials or employees have been found liable to any extent for the actions, ordinances, or plans of CTRPA, or for their own enforcement of the same.[8] Despite petitioners' protestations to the contrary, nothing in the recent decisions of this Court in *Maine v. Thiboutot*, __ U.S. __, 48 U.S.L.W. 4859 (June 25, 1980), or *Owen v. City of Independence*, __ U.S. __, 100 S.Ct. 1398 (1980) creates or recognizes a cause of actions against a local government or its officials based on their actions in performing a purely ministerial duty imposed by state law. These cases both dealt with the liability of the entity or person actually undertaking the allegedly unconstitutional actions, not with the derivative liability of some third party performing only ministerial actions required by state law.

Since the City and its councilmembers have no actual

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[8] The petitioners' argument that the councilmember-plaintiffs face removal from office or criminal prosecution should they fail to enforce CTRPA's plans and ordinances is even further from reality than the "threat" of civil liability. We are aware of no action taken by anyone or even under consideration by anyone which could lead to either of these results. Presumably, were one tried the defendant would have available the argument that he honestly believed that he was following the law rather than violating it. Moreover, as we have noted, the councilmembers can enforce the CTRPA ordinances and plans with no real spectre of civil liability. Thus, a subjective belief in the invalidity of the CTRPA plans and ordinances is really all that exists.

stake in the controversy herein, the Ninth Circuit's ruling was correct and the petition should be denied.

III

THE LIKELIHOOD OF MOOTNESS MAKES A DECISION IN THIS CASE UNNECESSARY

Obviously, due to the pressing workload of truly momentous cases, this Court should not be burdened with deciding cases which are unlikely to have any practical effect. We respectfully submit that this is such a case.

As petitioners briefly note, within the past two months both Nevada and California have approved changes to the compact which created the bi-state TRPA.[9] While the changes have not yet been approved by Congress, there is little reason to believe that such approval will be long in coming.[10] Once approved, the new compact will profoundly affect the claims pressed herein by the City, making many of them utterly meaningless even had the City standing to assert them. For example, one of the chief claims pressed by the City is that the CTRPA plans and ordinances unlawfully conflict with those imposed by TRPA and thus the CTRPA plans and ordinances must fall under the Supremacy Clause. While this claim possessed little chance at the time suit was filed, after the compact has been ratified it will have no validity whatsoever as the compact amendments require TRPA

[9] 1980 Cal.Stats. ch. 872; Nevada Assembly Bill No. 1, Special Session, 1980 Nev. Stats., ch. ___.

[10] A bill approving the new compact was introduced in the U.S. House of Representatives on September 30, 1980, as H.R. 8235.

to enforce the CTRPA plan in the California portion of the Lake Tahoe basin until TRPA has conducted a new study of the environmental problems of the basin and adopted a new plan based on that study.[11] Furthermore, while the City has attacked the subdivision ban imposed by CTRPA until 85% of the lots in the relevant portion of the basin have been used for the construction of a house or commercial structure, the new compact imposes a ban on new subdivisions until TRPA has adopted a new plan or until May 1, 1983, whichever is earlier.[12] Thus, even were a court to find that the subdivision ban imposed by CTRPA to channel development onto already existing lots was illegal, the court would be unable to order approval of new subdivisions without also invalidating the temporary restriction for planning purposes imposed directly by the California and Nevada legislatures with the approval of Congress.

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[11] 1980 Cal. Stats., ch. 872, art. V(e). The CTRPA transportation plan is treated somewhat differently. See *id.*, at art. V(b) and (e).
[12] 1980 Cal. Stats., ch. 872, art. VI.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

DATED: October 22, 1980

Respectfully submitted,

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IN THE

SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF EL DORADO

NO. 30115

DILLINGHAM DEVELOPMENT COMPANY,

Plaintiff,

v.

CALIFORNIA TAHOE REGIONAL PLANNING AGENCY; CITY OF SOUTH LAKE TAHOE, et al.,

Defendants.

DEMURRER TO COMPLAINT FOR INVERSE CONDEMNATION, DECLARATORY RELIEF, AND VIOLATION OF CIVIL RIGHTS

Defendant City of South Lake Tahoe demurs to the complaint on file herein on the following grounds:

I.

Each cause of action alleged fails to state a cause of

action against defendant City of South Lake Tahoe in that City is not responsible for the actions of CTRPA, nor for the creation of their plans and ordinances, nor for the consequences of those plans and ordinances.

II.

Plaintiff's Fifth Cause of Action fails to state a cause of action against City in that City is not a "person" within the meaning of 42 USCS § 1983.

III.

There is currently another action pending between the same parties on the same causes of action.

Dated: _____, 1977.

ROY C. ABRAMS
Attorney for Defendant
City of South Lake Tahoe

DECLARATION

I hereby declare that this demurrer is filed in good faith and is not filed for the purpose of delay and that, in my opinion, the grounds are well taken.

Dated: _____, 1977.

(S) ROY C. ABRAMS

The original of this demurrer was mailed for filing on _____, 1977.

Roy C. Abrams, City Attorney
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IN THE

SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF EL DORADO

NO. 30115

DILLINGHAM DEVELOPMENT COMPANY,

Plaintiff,

v.

CALIFORNIA TAHOE REGIONAL PLANNING AGENCY; CITY OF SOUTH LAKE TAHOE, et al.,

Defendants.

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEMURRER

I.

A CAUSE OF ACTION HAS NOT BEEN ALLEGED AGAINST DEFENDANT CITY OF SOUTH LAKE TAHOE

A. *Code of Civil Procedure § 430.10(f).*

Subsection (f) of Code of Civil Procedure Section 430.10 authorizes a demurrer when:

> (f) The pleading does not state facts sufficient to constitute a cause of action.

B. *Creation of California Tahoe Regional Planning Agency (CTRPA) And Its Mandate Upon The City of South Lake Tahoe.*

In 1967 the Legislature of the State of California created the CTRPA by statute (California Government Code Section 67000 et seq.) The agency was created "as a separate legal entity and as a political subdivision of the State of California" (Section 67040). It was empowered to preserve the natural resources and beauty of the Lake Tahoe region (Sections 67000, 67001) with authority to adopt a regional plan and to enforce it by ordinances, rules, regulations and policies (Sections 67002, 67100).

The City of South Lake Tahoe is a governmental entity within the Lake Tahoe region as defined in the statute (Section 67021). By virtue of that status alone, City is mandated to enforce both the CTRPA regional plan and all of the agency's ordinances, rules, regulations and policies.

> All provisions of the Tahoe regional general plan shall be enforced by the agency and by the counties and the cities in the region. Section 67072.
>
> All ordinances, rules, regulations and policies adopted by the agency (CTRPA) shall be enforced by the agency, and by the counties and cities. Section 67102.

C. *Jacobson v. Tahoe Regional Planning Agency.*

Most recently, in August 1977, the United States Court

of Appeals for the Ninth Circuit, *in Jacobson v. TRPA,* No. 75-2400, faced the question of whether local government was responsible for the actions of TRPA. *Jacobson,* attached hereto for the Court's reference as Exhibit A, was consolidated with three other cases upon appeal. It should be noted at the outset that TRPA is a creation of the States of California and Nevada through a bi-state Compact which was ratified by the United States Congress. The Compact imposes upon local government the same responsibilities of enforcement as does the CTRPA legislation.

The *Jacobson* Court concluded that dismissal of the counties in the Lake Tahoe area was proper (pages 11–12). The counties, joined because of their enforcement authority of the TRPA General Plan, were not responsible for the actions of TRPA. TRPA was found not to be an agent of the counties. (It is interesting to note that in the instant case plaintiff alleges that City is an agent of CTRPA. However, there is no allegation of City action beyond that. *Even assuming, arguendo, that such a relationship exists, there seemingly would be no liability in an agent for a principal's independent actions unrelated to the "agency" relationship. Absent some conduct of the so-called agent, liability is not present.*)

D. *Western International Hotels v. Tahoe Regional Planning Agency (TRPA), Douglas County, Washoe County, et al.*

In *Western International Hotels,* 387 F. Supp. 429 (D. Nev. 1975), defendants Douglas and Washoe Counties moved to dismiss the complaint alleging inverse condemnation and challenging the validity of TRPA's plans

and ordinances. Plaintiffs sought to hold both Douglas and Washoe Counties in the litigation by arguing that the Counties were liable for the consequences of the TRPA plan and ordinances because they had the statutory duty to enforce them and, additionally, because the Counties had the obligation of funding the agency. Moreover, it was argued that each County appointed a representative to the agency's governing body (*Western,* at page 438). *The Court, in granting Counties' motion to dismiss,* stated:

> The *Counties, however, had no part in enacting the Tahoe Regional Planning Compact nor did they legislate the Land Use Ordinance.* The *duty to enforce* and finance TRPA actions *was thrust on the Counties* by the Compact. [Emphasis added] *Western* at page 438.

The Court further emphasized that the complaint did not state a cause of action.

> While TRPA may be an agent of the States, it is clearly not an agent of the Counties. *If a cause of action is made out against TRPA, it will not constitute a cause of action against the Counties. The requests of these plaintiffs for injunctive relief against the enforcement by the Counties of the LUO (Land Use Ordinance) may be considered at such time as LUO is invalidated and the Counties persist in enforcing it.* Such relief is premature at this time. [Emphasis added] *Western* at page 438.

E. *Western As Applied To The Instant Case.*

The complaint herein on file alleges in Paragraph 10 that the "City of South Lake Tahoe has acted as an agent

of, and in agreement with, CTRPA." (It is noted parenthetically that such is not correct as a factual matter. The City has itself filed suit against CTRPA alleging that its ordinances and regulations are unconstitutional; that suit is presently pending in the United States Court of Appeals for the Ninth Circuit.) However, *in any event, the complaint does not allege any actions of the City—as a principal or agent—which will be sufficient to state a claim for relief.*

As in *Western,* supra, the City has not adopted the CTRPA plan or its ordinances, rules, regulations or policies. They have been *thrust upon the City,* as the TRPA ordinances were thrust upon Douglas and Washoe Counties, by virtue of a California state statute. Moreover, and importantly, the City has not sought to enforce such plans and ordinances against plaintiff. The City stands as an unwilling party—both to this lawsuit and to the CTRPA. As such, it can hardly be properly contended that the City is an agent of CTRPA or that, as an agent, it has acted on behalf of CTRPA. *The elements that were present in Western, that caused the Court to dismiss the case against the Counties, are present in the instant case and require dismissal.*

F. *After Western, Layton-Tahoe Properties v. TRPA (1975).*

Subsequent to the decision in *Western,* a similar question of county (local government) liability for TRPA plans and ordinances was raised in *Layton-Tahoe Properties v. TRPA,* Civil No. S-74-547 (E. D. California 1975), attached hereto as Exhibit B. The action brought was one for inverse condemnation. Judge Battin, in de-

ciding to grant the counties motion to dismiss, cited and quoted from *Western.*

G. *Derivative Liability.*

The thrust of plaintiff's complaint is that the City of South Lake Tahoe is liable as an agent of the CTRPA (Complaint, Paragraph 10). Such contentions are those of derivative liability. It thus follows that, to the extent that the CTRPA is not liable, the City of South Lake Tahoe is also not liable.

II.

CITY IS NOT A "PERSON" WITHIN THE MEANING OF THE CIVIL RIGHTS ACT

In the instant case, plaintiff seeks redress for alleged violations of certain specified constitutional rights by invoking this Court's jurisdiction pursuant to the provisions of 42 USCS § 1983. Plaintiff has named the City of South Lake Tahoe, a municipal corporation organized pursuant to the laws of the State of California, in Paragraph 10 of its Complaint, as an agent of CTRPA and has incorporated said paragraph by reference into its Fifth Cause of Action. To the extent that such pleading is an attempt to hold City responsible for violations of 42 USCS § 1983, it must fail.

The law is well settled that a "municipality is not a person" within the provisions of 42 USCS § 1983. In *City of Kenosha v. Bruno,* 412 U.S. 507, 37 L.Ed 2d 109 (1973), an action brought pursuant to 42 USCS § 1983, the Court, in relying upon the doctrine of *Monroe v. Pape,* 365 U.S.

167, 5 L.Ed 2d 492 (1961), stated at page 513:

> In a few cases in which equitable relief has been sought, a municipality has been named, along with city officials, as defendant where violations of 42 USC § 1983 [42 USCS § 1983] were alleged. See, e.g. *Douglas v. City of Jeannette,* 319 US 157 [87 L Ed 1324, 63 S Ct 877]; *Holmes v. City of Atlanta,* 350 US 879 [100 L Ed 776, 76 S Ct 141]. The question dealt with in our opinion was not raised in those cases, either by the parties or by the Court. Since we hold that a municipal corporation is not a "person" within the meaning of § 1983, no inference to the contrary can any longer be drawn from those cases.
>
> *We find nothing in the legislative history discussed in Monroe, or in the language actually used by Congress, to suggest that the generic word "person" in § 1983 was intended to have a bifurcated application to municipal corporations depending on the nature of the relief sought against them.* Since, as the Court held in *Monroe,* "Congress did not undertake to bring *municipal corporations* within the ambit of" § 1983, id., at 187, 5 L Ed 2d 492, they *are outside of its ambit for purposes of equitable relief as well as for damages. The District Court was therefore wrong in concluding that it had jurisdiction of appellees' complaints under § 1343.* [Emphasis added]

See *City of Charlotte v. Firefighters,* ___ U.S. ___, 48 L.Ed 2d 636 (1976), wherein *City of Kenosha v. Bruno* was cited with approval. Also see *Fitzpatrick v. Bitzer,* ___ U.S. ___, 49 L.Ed 2d 614 (1976).

In *Moor v. County of Alameda,* 411 U.S. 693, 36 L.Ed 2d 596 (1973), an action in part pursuant to 2 USCS § 1983, the Court again faced the question of whether a

governmental entity was a "person" within the meaning of said statutes. The Court, after considering whether a governmental entity could be held vicariously liable for the actions of its employees by incorporating State law pursuant to 42 USCS § 1983, concluded that the county was not a "person" and that the trial court had properly granted its motion to dismiss.

Consequently, in the instant case there is no claim stated against said City as it is not within the provisions of the statutes relied upon by plaintiff in its Fifth Cause of Action.

III.

PLAINTIFF HAS PENDING A FEDERAL COURT ACTION BETWEEN THE SAME PARTIES ON THE SAME CAUSES OF ACTION

A. *Code of Civil Procedure § 430.10(c).*

Subsection (c) of Code of Civil Procedure Section 430.10 authorizes a demurrer when:

> (c) There is another action pending between the same parties on the same cause of action.

B. *Plaintiff's Federal Litigation.*

On December 17, 1976, plaintiff filed an action for inverse condemnation, declaratory relief and violation of civil rights in the United States District Court for the Northern District of California. The case was then transferred to the Eastern District of California; its number is Civil S-77-285-TJM. (A copy of the Complaint is attached hereto as Exhibit C.)

This state court action seeks identical relief on the same grounds as are set forth in plaintiff's federal action. Abatement of this action is appropriate until a selection of forums is made by Dillingham.

Dated: November 22, 1977.

Respectfully submitted,

Roy C. Abrams, *Attorney for Defendant City of South Lake Tahoe*

IN THE

SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SACRAMENTO

NO. 272204

DILLINGHAM DEVELOPMENT COMPANY,

Plaintiff,

vs.

CALIFORNIA TAHOE REGIONAL PLANNING AGENCY, et al.,

Defendants.

JUDGMENT OF DISMISSAL AFTER ORDER SUSTAINING DEMURRER WITHOUT LEAVE TO AMEND

WHEREAS, defendant City of South Lake Tahoe's demurrer to Plaintiff's Complaint has been sustained without leave to amend with respect to the First and Second Causes of Action; and

WHEREAS, said Order sustaining the demurrer herein was rendered by the Honorable Fred Marler on August 8, 1979, and entered in Book 474, page 115; and

WHEREAS, notice of the sustaining of said demurrer has been sent to Plaintiff; and

WHEREAS, application has been made for entry of judgment in favor of Defendant City of South Lake

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Tahoe and against Plaintiff Dillingham Development Company; and good cause appearing therefor,

IT IS ORDERED, ADJUDGED AND DECREED that the First and Second Causes of Action of Plaintiff's Complaint be, and the same are hereby, dismissed as to Defendant City of South Lake Tahoe with prejudice. Plaintiff is to take nothing by this action with respect to said causes of action.

DATED this 26th day of March, 1979.

Judge of the Superior Court

Roy C. Abrams, City Attorney
CITY OF SOUTH LAKE TAHOE
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South Lake Tahoe, CA 95705
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Attorney for Defendant City of South Lake Tahoe

IN THE

**SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SACRAMENTO**

NO. 272204

DILLINGHAM DEVELOPMENT COMPANY,

Plaintiff,

v.

CALIFORNIA TAHOE REGIONAL PLANNING AGENCY, et al.,

Defendants.

NOTICE OF COURT'S ORDER SUSTAINING CITY OF SOUTH LAKE TAHOE DEMURRER WITHOUT LEAVE TO AMEND

TO: DILLINGHAM DEVELOPMENT COMPANY, ITS ATTORNEYS, FULOP, ROLSTON, BURNS & McKITTRICK; CALIFORNIA TAHOE REGIONAL PLANNING AGENCY, STATE OF CALIFORNIA, OTHER NAMED DEFENDANTS, THEIR ATTOR-

NEY JOEL S. MOSKOWITZ:

YOU ARE HEREBY NOTIFIED that on August 8, 1978, the above-entitled court issued an order sustaining the demurrer of the City of South Lake Tahoe to the First and Second Causes of Action without leave to amend. The order was entered in Book 474, Page 1115. Said order is based on the Court's decision that the First and Second Causes of Action of plaintiff Dillingham's complaint fail to state a cause of action.

A copy of the Court's decision is attached hereto.

Dated: August 15, 1978.

Roy C. Abrams, *Attorney for City of South Lake Tahoe*

No. 80-458

Supreme Court U.S.
FILED
NOV 24 1980
MICHAEL RODAK JR. CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1980

CITY OF SOUTH LAKE TAHOE, ROGER CAPRI, as Mayor of the City of South Lake Tahoe; JOHN WYNN, ROBERT KAUFMAN, WILLIAM MOYER and PATRICIA LOWE, as City Councilmembers of the City of South Lake Tahoe,

Petitioners,

vs.

CALIFORNIA TAHOE REGIONAL PLANNING AGENCY, and GORDON HOOPER, GERALD M. POZNANOVICH, JAN CHATTEN-BROWN and KENNETH L. WOODWARD, individually and as members of the Governing Body of the California Tahoe Regional Planning Agency,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Reply Brief for Petitioners

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No. 80-458

In the Supreme Court of the United States

OCTOBER TERM, 1980

CITY OF SOUTH LAKE TAHOE, ROGER CAPRI, as Mayor of the City of South Lake Tahoe; JOHN WYNN, ROBERT KAUFMAN, WILLIAM MOYER and PATRICIA LOWE, as City Councilmembers of the City of South Lake Tahoe,

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Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Reply Brief for Petitioners

Respondents urge that a writ of certiorari not issue in this case for three reasons: (1) the abstention doctrine precludes consideration by the federal courts of any issue which is local in character and which invokes unresolved state law questions; (R.B. pp. 8-16)[1] (2) the Petitioners lack standing because they seek to assert rights

1. Respondents' Brief In Opposition is referred to as "R.B.".

of third parties and their own injuries are speculative (R.B. pp. 16-29); (3) the issues presented by Petitioners likely will be moot (R.B. pp. 29-30). None of these arguments has merit.

I.

THE ABSTENTION DOCTRINE IS INAPPLICABLE

A. Invocation of the Abstention Doctrine Is Premature.

As the Court of Appeals below recognized, the question of standing must be resolved before the abstention issue arises: "[S]tanding must be ascertained before a court proceeds to exercise its discretion to abstain. . . . Only after a court is satisfied that standing and the other jurisdictional prerequisities are met may it determine, within its discretion, whether to abstain." 625 F.2d 231, 232-233. Thus, at this stage of the proceeding, consideration of the abstention issue is premature. Certainly it would be inappropriate for this Court to decide the case on the basis of an issue that was not considered by the Court of Appeals, rather than on the standing issue which was dispositive of the case in the Court of Appeals. However, if this Court were to decide the issue on that basis, it should only be after full briefing and argument.

B. The Action Does Not Involve Controlling State Law Issues.

Contrary to the repeated assertions of Respondents, state law issues are not controlling in this proceeding. First, the federal constitutional claims made by Petitioners are not before any state tribunal in any proceeding in which Petitioners are parties. Thus, the prosecution of this case presents no risk of "duplicative litigation." Second, the federal constitutional issues Petitioners have raised are separate from and independent of the state law claims which Petitioners may have against Respondents. Indeed, all state law issues between Petitioners and Respondents are the subject of a settlement agreement between them, which specifically reserves the federal claims included in these proceedings. Finally, the adoption of reasonable regulations for the preservation of the

Lake Tahoe Basin involves important federal policies. They are not merely a matter of local concern. Accordingly, under neither the so-called *"Pullman"* nor *"Burford"* doctrine is abstention appropriate.

II.

PETITIONERS HAVE STANDING

Both the City and the City Councilmembers have standing. That they are targets of litigation, both actual and threatened, is documented in Respondents' Reply Brief. Whatever the views of the Respondents with respect to immunity for "performing a purely ministerial duty imposed by state law" (R.B. p. 28), this Court has never recognized such a defense. The issue is one of extreme importance to all city officials, and if a rule similar to the one discussed by the Court of Appeals in *Jacobson v. Tahoe Regional Planning Agency,* 566 F.2d 1353 (9th Cir. 1978), *rev'd on other grounds, aff'd on other grounds sub nom. Lake Country Estates, Inc. v. Tahoe Regional Planning Agency,* 440 U.S. 391 (1979), is to become the law of the land, this Court should grant the writ and formulate the rule so that it can be implemented on a uniform basis.

With respect to the City's standing to sue, for the reasons stated in their petition, Petitioners believe the authorities based on *Hunter v. Pittsburgh,* 207 U.S. 161 (1907), are inapposite. However, if the rule is deemed to deny standing to municipalities where important federal constitutional issues are raised, it should be reexamined in view of the many recent decisions of this Court expanding civil liability of municipalities and their officials.

III.

THE CASE IS NOT AND WILL NOT LIKELY BECOME MOOT

As Respondents concede, this case is not now moot. That should be the end of the issue.

Nor is the case likely to become moot in the future. First, the enactment of H.R. 8235 is itself speculative. Second, if the statute

is eventually enacted, the final form it will take is currently uncertain. Third, even if the statute is enacted in its present proposed form, the case will not become moot since the statute does not do away with CTRPA but merely suspends its operations.[2] Thus, whatever the temporary fate of CTRPA, Petitioners face the real possibility that CTRPA will be resurrected and that the very risk this litigation seeks to resolve will recur. That risk alone is sufficient to warrant the prosecution of this action. *United States v. Concentrated Phosphate Export Ass'n., Inc.*, 393 U.S. 199, 202-204 (1968).

IV.

CONCLUSION

A writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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Of Counsel

November 20, 1980

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2. In all events, in its present form, the statute requires TRPA to adopt the unconstitutional CTRPA regulations. Petitioners face the identical untenable choice between obeying their oaths of office or enforcing the unlawful regulations.